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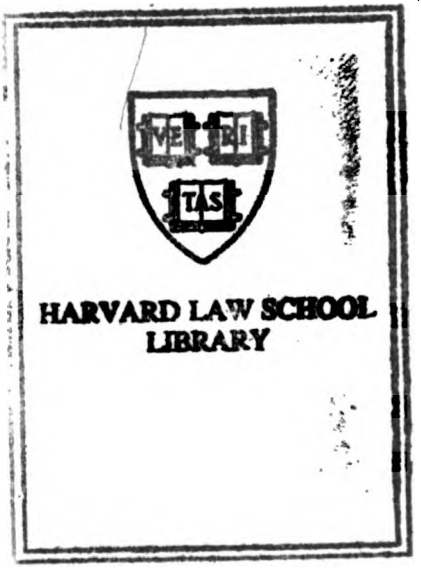

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2jj 466

1jj 563
1d 490
13m 118

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2m 527

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3m 328

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REPORTS

OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DECIDED IN

THE COURT OF APPEALS,

OF THE

COMMONWEALTH OF KENTUCKY.

HARVARD LAW SCHOOL LIBRARY.

BY J. J. MARSHALL,

REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.

VOLUME I.

Containing the Cases Determined between the 15th January, and 20th June, 1829.

FRANKFORT,

J. H. HOLEMAN, PRINTER.

1831.

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UNITED STATES OF AMERICA, } To-wit.
DISTRICT OF KENTUCKY, }

BE IT REMEMBERED, That on the tenth day of May, Anno Domini, one thousand eight hundred and thirty-one, JOHN J. MARSHALL, of the said District, hath deposited in this office, the title of a book, the title of which is in the words following, to-wit:

"Reports of cases at law and in equity, argued and decided in the Court of Appeals of the Commonwealth of Kentucky. By J. J. Marshall, Reporter of the decisions of the Court of Appeals. Volume I Containing the cases determined between the 15th January, and the 20th June, 1829."

The right whereof, he claims as author and proprietor, in conformity with an act of Congress, entitled "an act to amend the several acts, respecting copyrights."

JOHN H. HANNA,
(SEAL.) *Clerk of the District of Kentucky.*

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RULES OF PRACTICE

OF THE

COURT OF APPEALS OF KENTUCKY.

Established by the Court at different periods, and in force on the 20th June, 1829:

Extract from the statutes establishing the Court.

"The Court of Appeals shall have power to direct the writs, summonses, process, forms and mode of proceedings, to be issued, observed, and pursued by the said Court of Appeals." 1 Litt. L. K. 104; 1 Dig. L. K. 381.

Adopted Spring Term, 1810.

MOTIONS.

1. Motions may be made immediately after the orders of the preceding day are read, and the opinions of the court delivered in; but at no other time, unless in cases of necessity, or in relation to a cause when called in course.

2. They are to be made by the attorneys in the following order: First, by the attorney general; next, by the eldest practitioner at the bar, and so on, in regular succession, to the youngest. But no attorney to make a second motion, until each has had an opportunity of making his motion.

3. Affidavits must be used, when a motion is bottomed upon a matter of fact, which, according to the practice of the court, should be sworn to.

SUPERSEDEAS.

4. No *supersedeas* will be granted, unless the transcript of the record, on which the application is made, be complete, and so certified by the clerk.

5. When a writ of error shall have been made a *supersedeas*, the clerk shall issue a certificate, in substance as follows:

KENTUCKY, SCT.

Clerk's Office of the Court of Appeals.

I do hereby certify, that a writ of error hath issued from this office, for the reversal of a judgment obtained by A, against B, in the ——— court of ———, at their ——— term —— 18 —— in a certain action of ———, for ———, which writ of error is to operate as a *supersedeas*, and as such, is to be obeyed. Given under my hand, this —— day of ———. Which certificate shall have the same effect, as if a regular *supersedeas* had issued.

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WRITS OF ERROR.

6. Writs of error shall be directed to the clerk or keeper of the record, in which the judgment or decree complained of, is entered, commanding him to certify a transcript of the said record to this court.

7. When a plaintiff in error, shall file a record duly certified to be full and complete, before a writ of error issues, it shall not be necessary to send such writ to the clerk of the inferior court; but the writ shall be made out and filed by the clerk of this court with the said record; which record shall be taken and considered as a due return to said writ.

PROCESS ON WRITS OF ERROR.

8. The proces on writs of error, shall be a *subpœna* directed to the sergeant or to the sheriff of the proper county, (or, in case the sheriff be interested in the suit, to the coroner,) commanding him to summon the defendant in error, to appear in court, to show cause, if any he can, why the judgment or decree mentioned in the said writ of error, should not be reversed.

9. If the *subpœna* be not returned executed, an *alias*, *pluries*, &c. may issue at any time, on the application of the party, without a special order of court, therefor.

10. Where it shall appear to the court by satisfactory proof, that a defendant is not an inhabitant of this state, there shall be a day fixed for his appearance and an order to advertise; which order shall be published once a week for three weeks successively, in some one of the newspapers published in Frankfort, the last of which publications, shall be four weeks at least preceding the appearance day. After publication as aforesaid, and an affidavit therof, filed with the clerk, the cause shall stand for hearing in the same manner as if a *subpœna* against such defendant had been returned executed.

11. A fee of one dollar shall be allowed for every publication, which shall be taxed and recovered by the plaintiff, if successful, as other costs are.

APPEALS.

12. The clerk shall receive and docket the record of any appeal, within the period the court has, by law, a discretion to receive it: *Provided, however*, the court may, on motion, dismiss the appeal at any time during the term next succeeding, for such reasons, as would be sufficient to prevent the court from receiving it.

ABATEMENTS AND REVIVALS.

13. When an appeal or writ of error shall abate by the death of either party, a *subpœna* may be taken out in favor of or against

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the legal representatives of the deceased, as the case may be, directed as above prescribed, summoning the defendant or appellee, to show cause why the suit should not be revived; which being returned executed, the cause shall stand revived without further order, unless cause be shown against the revival, in which case, such order will be made, as the nature of the case may require.

14. Or, on the motion of the proper party, the cause may be revived in the names of the representatives of the deceased, without any previous process; but in such case, a copy of the order of revivor shall be served on the defendant or defendants, before the re-hearing of the cause.

DOCKETING SUITS FOR HEARING.

15. The clerk shall set the causes for hearing in the order they come into his office, except those hereinafter provided for.

16. Causes which require oral testimony, shall be set for trial by the clerk on such days of the term, as may appear to him proper, having regard to the times such causes came into his office, and to the number of suits in the court.

17. Causes to which the commonwealth is a party, shall be set to the fifteenth day of the term.

ASSIGNMENTS OF ERROR.

18. In writs of error not operating as a *supersedeas*, and in appeals, the plaintiff or appellant shall, within eight days after filing the record, assign in writing, and file with the clerk, the particular error or errors, of which he complains. No other errors shall afterwards be alleged by the party, or examined into by the court.

19. If the party fail to assign errors as aforesaid, a rule to assign errors shall be given, and if errors be not assigned by the expiration of the rule, the cause may, on motion, be dismissed.

20. The plaintiff or appellant shall be allowed four days after the return to a *certiorari* shall be filed, to assign errors in the record brought up by the *certiorari*, and which were not contained in the record first filed.

ORDER OF PROCEEDING WITH SUITS ON THE DOCKET, &c.

21. Suits set for a particular day will be taken up and disposed of on that day, or as soon thereafter, as may be practicable.

22. The other suits shall be called and heard, continued or dismissed, in the order they stand docketed; saving however, to the court, the right of postponing any cause, or setting it to a particular day, for any sufficient reason appearing to them.

23. The court will not permit a cause to be continued by the consent of the parties only; the consent of the court must be obtained.

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24. When a cause is regularly called up, the appellant or plaintiff will be called; if he appear not by himself or counsel, or attorney, the suit will be dismissed for want of prosecution; if he appear, the appellee or defendant will be called, and if the process so operates as that he is bound to appear, and makes default, the cause shall progress, unless for cause shown.

BRIEFS.

25. The counsel on each side of every chancery cause, shall furnish the court, at a convenient time preceding the argument, with a written statement of the material points in the case; but no error or omission therein, shall prejudice the counsel in argument, or the court in their adjudications. (See, Rule 35.)

RE-HEARINGS.

26. Re-hearings must be applied for by petition in writing, setting forth the cause or causes, for which the judgment or decree is supposed to be erroneous. The court will consider the petition without argument, and if a re-hearing is granted, direct it as to one or more points, as the case shall in their opinion require. But no application for a re-hearing will be heard, after leave has been given, to take out a copy of the judgment or decree. (See, Rule 34.)

COPIES OF JUDGMENTS AND DECREES, WHEN THEY MAY BE TAKEN OUT.

27. On motion, permission will be given as a matter of course, to take out a copy of a judgment or decree of this court, at any time after the expiration of fifteen juridical days, from the day on which the judgment or decree was rendered, except in those cases in which the title of land or the freehold, was in question.

[In the construction of this rule, days of recess are excluded. At the end of the term, copies of the mandates issue of course, except where the decisions are suspended by petition for re-hearing, or special order of the court.]

RETURN DAYS.

28. The first day of every term shall be a general return day for writs of error and process, preparatory to the hearing of a cause; but if they be sued out in term time, they may be made returnable on any day therein expressed, provided it does not exceed the fiftieth day of the term.

[In calculating the days of the term under this rule, days of recess in the term, are included. In several cases at the Spring term, 1829, where by excluding the days of recess, writs of error had been made returnable before their teste, the writs were held erroneous, not amendable, and were quashed on motion. See, among others, Hoy, Lawrence, &c. vs. Rogers, Davidson, &c. Order Book, Y. pages 265 and 318.]

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29. The first Monday in each month, shall be a return day for executions issued from this court. They shall be returnable on some one of those return days, and there shall be at least thirty, and not more than ninety days, between their test and return.

Adopted Fall Term, 1810.

TRANSCRIPTS OF RECORDS MAY BE USED BY EITHER PARTY.

30. When the transcript of the record of a suit shall be lodged with the clerk of this court, in any judicial proceeding, such transcript may be used by either party to the record, on any motion for *supersedeas*, appeal or writ of error, made or prosecuted by either of them.

Adopted Spring Term, 1811.

TAXATION OF COSTS.

31. In all cases, where the costs of the record or papers filed in this court in any suit, be not certified by the clerk of the court from whence the record or papers came, the clerk of this court shall, when necessary, ascertain the amount of such costs from the record and papers filed.

Adopted Spring Term, 1817.

DELAY CAUSES.

32. Whenever it may be suggested, and the court, upon inspecting the record, shall be of opinion, that any appeal depending in this court, has been taken and prosecuted for the purpose of delay, it will be taken up, and disposed of, without having been regularly called upon the docket.

33. In cases which, in the opinion of the court, have been brought for delay, permission, as a matter of course, will be immediately given to take out a copy of the judgment or decree of this court.

RE-HEARINGS.

34. Petitions for re-hearing must be presented within fifteen juridical days, from the time of rendering the judgment or decree sought to be reviewed. (See, Rule 24.)

Adopted Spring Term, 1823.

BRIEFS.

35. No cause shall be argued or submitted to the court for a decision, unless the counsel or parties, on each side, shall, in convenient time, before the hearing or submission, furnish the court with a brief statement, in writing, of the points of law relied on,

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and a citation of such appropriate authorities in support thereof, as they may wish to use. The party failing to comply with this rule, shall be considered as making default; and if such failure be on the part of the appellee or defendant in error, the opposite party shall be permitted to proceed alone in the argument: *Provided, however*, That neither party in the argument, shall be restricted to the use of the authorities, cited in such statements. (See, Rule 25.)

Adopted June 2, 1826.

JUDGMENTS AND DECREES.

36. After the expiration of fifteen juridical days, from the day on which a judgment or decree is rendered, the clerk shall, as matter of course, deliver copies of such judgment or decree, unless the case is suspended by a petition for a re-hearing, or otherwise.

Adopted November 2, 1827.

EXECUTIONS FOR COSTS.

37. The clerk may issue executions for costs, in any case, during term time, in cases decided at the same term: *Provided*, That by the rules of court, the opinion, judgment or decree of the court may be taken out officially.

Adopted January 5, 1828.

ARGUMENT OF CROSS APPEALS.

38. Cases of appeal or writ of error, depending on the same record, upon complaint of error, by the plaintiff and defendant, will be heard together; the counsel will be heard in the same order, as if but one appeal or writ of error were pending; the counsel for the plaintiff below, will open the argument upon all the errors assigned; the counsel for the defendant below will next be heard, and the counsel for the plaintiff below will conclude the argument.

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JUDGES OF THE GENERAL COURT,

Specially required by statute to attend at every Term and hold the Court:

JOHN L. BRIDGES.

HENRY PIRTLE.

All the other Circuit Judges are, also, members of the court; but their attendance is not enforced. One Judge may constitute a Court.

THE CIRCUIT JUDGES,

FROM 1ST. JANUARY, 1829, TO 20TH JUNE, 1829.

WILLIAM P. ROPER—*First District*—Mason, Fleming, Lewis, Bracken and Greenup.

HENRY O. BROWN—*Second District*—Harrison, Pendleton, Nicholas, Campbell, Boone and Grant.

THOMAS M. HICKEY—*Third District*—Fayette, Scott and Owen.

HENRY DAVIDGE—*Fourth District*—Franklin, Shelby, Henry, Gallatin, Oldham and Anderson.

HENRY PIRTLE—*Fifth District*—Jefferson and Mead.

HENRY P. BROADNAX—*Sixth District*—Logan, Warren, Simpson, Allen, Butler and Todd.

BENJAMIN SHACKLEFORD—*Seventh District*—Livingston, Caldwell, Christian, Hickman, Trigg, Calloway, Graves and M'Cracken.

BENJAMIN MONROE—*Eighth District*—Green, Adair, Cumberland, Monroe, Hart, Barren and Edmonson.

WILLIAM L. KELLY—*Ninth District*—Washington, Mercer, Spencer, Woodford and Jessamine.

RICHARD FRENCH—*Tenth District*—Appointed March 3d, 1829, in the place of GEORGE SHANNON, resigned—Bourbon, Clarke, Madison and Estill.

SILAS W. ROBBINS—*Eleventh District*—Montgomery, Bath, Floyd, Lawrence, Pike and Morgan.

JOHN L. BRIDGES—*Twelfth District*—Garrard, Lincoln, Casey, Wayne, Pulaski, Russell and Laurel.

PAUL I. BOOKER—*Thirteenth District*—Nelson, Hardin, Bullitt and Grayson.

ALNEY M'LEAN—*Fourteenth District*—Muhlenburg, Hopkins, Union, Henderson, Ohio, Daviess and Breckenridge.

JOSEPH EVE—*Fifteenth District*—Rockcastle, Knox, Clay, Perry, Harlan and Whitley.

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JUDGES

OF THE

COURT OF APPEALS OF KENTUCKY.

FROM ITS ESTABLISHMENT TO 20TH OF JUNE, 1829.

CHIEF JUSTICES.

HARRY INNIS, commissioned June 28th, 1792, according to the statute establishing the court.

GEORGE MUTER, 7th December, 1792, in place of Harry Innis, appointed Judge of the United States' Court, for the District of Kentucky.

THOMAS TODD, 13th December, 1806, in place of George Muter, resigned.

FELIX GRUNDY, 11th April, 1807, in place of Thomas Todd, appointed Associate Justice of the Supreme Court of the United States.

NINIAN EDWARDS, 5th January, 1808, in place of Felix Grundy, resigned.

GEORGE M. BIBB, 30th May, 1809, in place of Ninian Edwards, re-igned.

JOHN BOYLE, March 20th, 1810, in place of George M. Bibb, resigned.

GEORGE M. BIBB, 5th January, 1827, in place of John Boyle, appointed Judge of the United States Court for the District of Kentucky.

Note. Chief Justice BIBB, resigned 23d December, 1828, and the office of Chief Justice remained vacant until 16th December, 1829.

SECOND JUDGES.

BENJAMIN SEBASTIAN, commissioned June 28th, 1792, according to the statute establishing the court.

FELIX GRUNDY, 10th December, 1806, in place of B. Sebastian, resigned.

ROBERT TRIMBLE, 13th April, 1807, in place of Felix Grundy, promoted.

JOHN BOYLE April 1st 1809, in place of Robert Trimble, resigned.

CALEB WALLACE, elevated March 20th, 1810, by the abolition of the numerical rank, and the establishment of that of seniority, by an act approved January 31st, 1810, in place of John Boyle, promoted.

WILLIAM LOGAN, elevated by seniority, 1813, in place of C. Wallace, resigned.

WILLIAM OWSLEY, elevated by seniority, 1819, in place of W. Logan, resigned.

GEORGE ROBERTSON, commissioned December 24th, 1828, in place of William Owsley, resigned.

THIRD JUDGES.

CALEB WALLACE, commissioned 28th June, 1792, according to the statute establishing the court.

WILLIAM LOGAN, elevated by seniority, March 20th, 1810, in place of Caleb Wallace, elevated to the second rank.

WILLIAM OWSLEY, elevated by seniority, 1813, in place of William Logan, elevated to the second rank.

JOHN ROWAN, commissioned 14th January, 1819, to fill the vacancy occasioned by the resignation of William Logan, and elevation of William Owsley to his rank.

BENJAMIN MILLS, commissioned February 16th, 1820, in place of John Rowan, resigned.

JOSEPH R UNDERWOOD, commissioned December 24th, 1828, in place of B. Mills, resigned.

FOURTH JUDGES.

THOMAS TODD, commissioned 19th December, 1801, in pursuance of the statute creating the office, approved on that day.

NINIAN EDWARDS, 13th December, 1806, in place of Thomas Todd, promoted.

WILLIAM LOGAN, 11th January, 1808, in place of Ninian Edwards, promoted.

GEORGE M. BIBB, 31st January, 1808, in place of William Logan, resigned.

JAMES CLARK, 29th March, 1810, in place of George M. Bibb, promoted.

WILLIAM OWSLEY, 8th April, 1812, in place of James Clark, resigned.

It was provided by a statute, approved January 20th, 1813, that whenever a vacancy should happen, by death, resignation or otherwise, the court should consist of three Judges only; whereby, after the resignation of Judge Wallace, and consequent elevation of Judge Owsley to the third rank, the office of fourth Judge ceased to exist.

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PRINCIPAL OFFICERS OF GOVERNMENT,

IN THE TIME OF THIS VOLUME.

THOMAS METCALFE,
GOVERNOR.

JOHN BREATHITT,
LIEUTENANT GOVERNOR AND SPEAKER OF THE SENATE.

TUNSTALL QUARLES,
SPEAKER OF THE HOUSE OF REPRESENTATIVES.

THOMAS T. CRITTENDEN,
SECRETARY OF STATE.

JAMES W. DENNY,
ATTORNEY GENERAL.

THE COURT OF APPEALS.

From 1st January, 1829, to June 20th, 1829.

THE OFFICE OF CHIEF JUSTICE, VACANT.

GEORGE ROBERTSON,
JOSEPH R. UNDERWOOD, } JUDGES.

JAMES W. DENNY,
ATTORNEY GENERAL.

JOHN J. MARSHALL,
REPORTER.

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CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS,

JANUARY AND FEBRUARY,

1829.

Hickey vs. Young and others.

CHANCERY.

Error to the Clarke Circuit; GEORGE SHANNON, Judge.

Case 1.

Resulting Trust. Depositions. Error. Costs. Parties. Decrees.

Judge ROBERTSON delivered the opinion of the Court.

January 16.

THE complainant below and now plaintiff in error, charges in his bill, filed in the Clarke circuit court, against Wm. Webb and Jno. Young, that in 1822, he made a parol contract with said Webb, as the agent of Geo. Webb, of Illinois for the purchase of a house and lot of said George, in the town of Winchester in said county, for which he agreed to give $600 in notes on the Bank of the Commonwealth, and $600 in cabinet work—that he paid the $600 in Commonwealth's paper and $324 in cabinet work, and was ready and willing to pay the remaining $276 according to his contract, but was prevented, by the conveyance of the said house and lot by George Webb to defendant Young, in December 1822, who paid the said sum of $276 to Webb, and was fully acquainted with all the foregoing facts. The prayer of the bill is for an enforcement of a supposed equitable lien on the house and lot, for the advances alleged to have been made by Hickey, or a decree for the value of those advances against the defendants.

Allegation of Hickey's bill.

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HICKEY vs. YOUNG AND OTHERS.

By an amended bill, George Webb is prayed to be made defendant.

Answer of Will. Webb.

William Webb, in his answer, denies that he ever made any contract whatever with Hickey for the house and lot, but avers that the contract was made with his co-defendant Young, who made all the payments, and consequently obtained a deed.

Young's answer.

Young answered to the same effect; and also avers that he delivered $700 in Commonwealth paper to Hickey, to pay to Webb, only $600 of which he paid, exhibits Webb's bond to himself for a title to the house and lot, dated in September, 1822, and insists that Hickey owes him, for which he asks a decree. He admits that Hickey, (who is a cabinet workman) made the furniture (excepting one bureau,) which was paid to Webb; and states that Hickey, because he was his son-in-law, was permitted to live for nearly two years in the house after his purchase.

Proofs.

There is no proof of a contract between Hickey and Webb, and consequently Webb was improperly made a defendant.

It is proved by two witnesses that Young admitted that he had given Hickey $700 with directions to purchase for the use of his wife (who was Young's daughter) a female slave or a house to live in; and that Hickey furnished all the furniture advanced to Webb, except one bureau. It is also proved that Hickey stated, that Young would be dissatisfied with his retention of the $100; and for some private reason, the title to the lot was to be in Young; and Young further proved that the contract was made by him, and that Hickey was present when the bond for title was executed to him and made no objection.

Decree of the circuit court dismissing the bill.

The court below having dismissed the bill and decreed to the *defendants* costs, the plaintiff in error questions the propriety of the decree.

Three points are embraced in the assignment of errors.

The first and most important is, whether there was error in dismissing the bill.

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If the evidence had proved any facts from which an equitable lien could be reasonably deduced, or a resulting trust inferred, a bill might have been sustained; but there is not even the semblance of evidence tending to prove a lien. The contract having been made by, and in the name of Young, and with the knowledge and assent, and in the presence of Hickey, there seems to be no analogy between this case and any of those in which an equitable lien exists. Nor can the court admit that there is sufficient evidence of a trust between Hickey and Young to authorise a decree on that ground in favor of Hickey. Justice and policy, as well as unquestionable authorities to be found in the decisions of this court and elsewhere, require that such trusts even when positively alleged, should be indisputably proved. Such is not, in our opinion, the evidence in this case; and if it were, it could not avail, because the bill contains no allegation or prayer to which it could be applied. Hickey seems never to have thought of such a relation between himself and Young, as would create a trust which would entitle him to relief on that ground.

HICKEY vs. YOUNG AND OTHERS.

Resulting trusts must be positively alleged and indisputably proved.

The most that can be presumed in favor of Hickey is, that Young intended to hold the title for the benefit of his daughter. This could not affect the case, even if the bill had relied on a trust resulting from parol evidence of facts; and on the facts proved, the Chancellor should not sustain a bill for the value of the furniture and money alleged to have been paid by Hickey. We concur, therefore, with the court below, in the opinion that the bill ought to have been dismissed.

The second point embraced in the assignment of errors, should have no influence—for although it was irregular to suffer a second deposition of the same witness, taken without leave, to be read, the one objected to in this case did not affect the decision; without it, the equity of Hickey according to the view already taken, was unsupported. If this deposition had been excluded, the decision should have been as it was. Erroneously admitting it, therefore, when its rejection could not in the slightest degree have operated to the plaintiff's advantage, can not be objected to by him.

Deposition taken a second time, without leave of the court erroneous; but if the merits of the case be not affected, no cause for reversal.

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HICKEY vs. YOUNG AND OTHERS.

Whether it is proper to decree costs in any case in favor of a defendant, who is before the court, only by constructive service, which is the third and last point presented for consideration, it is unnecessary now to decide; because, first, it does not appear in this case that there could be any costs to tax in favor of George Webb, and consequently, if he is embraced in the decree for costs, the plaintiff can not be prejudiced.

It is no objection by complainant to a decree, that it embraces a defendant who had not incurred cost.

Second; it cannot be fairly construed, that a decree that the defendants should have costs, would entitle an individual to costs who was not before the court, either by appearance, actual service of process or regular advertisement for two months: And we have not seen that George Webb became a defendant in either of these modes. The order we think was not published two months; but if it had been, we should not consider him entitled, by a reasonable application of the decree, to costs.

One named a defendant, but not served with process, advertised against, or otherwise appearing, is no party.

It is, therefore, the opinion of the court, that there is no error in the decree of the circuit court.

If Hickey made any contract with Young, in relation to the house and lot—if he, on request, furnished him with money or property—or appropriated either to his use, he may still have redress by an appropriate remedy, and the exhibition of satisfactory proof.

Complainant not barred of his appropriate remedy, by dismissal of his inappropriate bill.

The decree is affirmed with costs.

SCIRE FACIAS.

Case 2.

Ward vs. Prather's Adm'r.

Error to the Clarke Circuit; GEORGE SHANNON, Judge.

Variance. Nul tiel record. Judgments.

January 16. Judge UNDERWOOD delivered the opinion of the Court.

It is sufficient for a *scire facias* to contain such recitals as will point

WARD sued out a writ of *scire facias* to revive a judgment of the Clarke circuit court rendered against the intestate of the defendants. The plea of nul tiel record was filed and issue made up thereon. The court decided that the record offered in evidence was not the same set out in the *scire facias*, and there-

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upon gave judgment for the defendants. Exceptions were taken, and although the amount of the judgment sought to be revived, is only *seventy-five* cents, the case has been brought up for revision. The judgment in the court below, was rendered upon and in pursuance to an award which directed a division of the costs between the litigants; and in entering the judgment for the seventy-five cents, these words are added, "and that the costs herein expended be equally borne by the parties." The *scire facias* is silent in respect to the costs disposed of as above, and on that account the variance was adjudged fatal by the court below. We do not consider it necessary in a *scire facias* to copy literally and fully the judgment, and every order immediately connected therewith. We are of opinion, that if the *scire facias* contains such recitals as will point to the judgment intended to be revived, with such certainty that the defendants in the *scire facias*, must know what judgment is meant, it is sufficient. Now in this case, there is an exact coincidence between the record offered in evidence and the recitals in the *scire facias* as it regards the parties, the court, the date of the judgment, its having been entered upon an award, and its amount. Such an agreement could leave no doubt on the mind as to the judgment intended to be revived; and we cannot perceive what good could have resulted from copying in the *scire facias*, the above sentence in respect to the costs, or how the omission to copy it, could have mislead or prejudiced the defendants. We are therefore constrained to say, that there was such a substantial correspondence and agreement between the *scire facias* and record offered in evidence, that judgment should have been rendered for the plaintiff.

to the judgment intended to be revived, with such certainty, that the defendant must know what judgment is meant.

Clause subjoined to the judgment, that each party pay their own costs, need not be recited in the *scire facias*.

The judgment of the court below, is therefore reversed, and the cause remanded, with directions to enter judgment for the plaintiff, upon the issue found.

The plaintiff in error is entitled to his costs in this court.

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CIRCUIT.

Stockton vs. Scobie.

Case 3.

Error to the Montgomery Circuit; SILAS W. ROBBINS, Judge.

Bank note contracts. Interest.

January 16.

Judge UNDERWOOD, delivered the opinion of the Court.

Covenant to pay Bank notes found in an instrument containing covenant to do other things, not within the statute, authorising a recovery in kind.

THE only question presented in this case, is, whether in a suit upon a contract to pay notes on the Bank of the Commonwealth, and *to do other things*, the court has authority to give judgment for the Bank notes specifically, the plaintiff consenting to receive them, and making an endorsement on his declaration to that effect.

On the authority of the case of Sneed and Anderson, vs. Price, recently decided, and influenced by the reasoning of the court in the case of Wright vs. Coleman, 4 Bibb, 252, we are of opinion, that it was erroneous to render judgment for the notes of the Bank of the Commonwealth specifically; and that the court below, erred in excluding the evidence offered to prove the value of such notes, when they became due; their value and interest on it, being the proper criterion of damages.

Value of the paper when due, and interest thereon is the criterion of damages.

The judgment must therefore be reversed, and the cause remanded for proceedings to be had, not inconsistent with this opinion, and the plaintiff in error must recover his costs in this court.

CHANCERY.

Wilson vs. Laffoor.

Case 4.

Appeal from the Hopkins Circuit; AMNEY MCLEAN, Judge.

Rescision of contracts. Evidence.

January 21.

Judge UNDERWOOD, delivered the opinion of the Court.

Bill for rescision, on the ground of a superior adverse claim, known to vendor, but concealed.

THE appellant filed his bill in equity, to be relieved against a contract made with the appellee, upon the ground of fraud, practised, as is alleged, by the concealment of the appellee, of an adverse superior title to the lands sold to the appellant, and of which, the bill charges, the appellee had knowledge at the time of the contract.

Answer.

The answer denies the allegations of the bill.

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Parol evidence of the existence, and vendors knowledge of the alleged superior claim, without shewing the instruments of the title, will not avail to rescind the contract.

Upon inspecting the record, we discover, that the title which Wilson, the appellant relies on as superior to Laffoor's, and which Wilson charges to have been fraudulently concealed from him by Laffoor, is a patent for sixteen acres of land, granted to Francis Prince, on the 11th July, 1825, in consideration of a Kentucky Land office warrant, surveyed the 8th of Nov. 1823, and which interferes with the land sold to Wilson. Laffoor assigned a plat and certificate of survey, for fourteen acres of land, made in virtue of a Kentucky land office warrant, and conveyed his interest in seventy-five acres of land, purchased from William Rhea, to Wilson, before Prince had his survey made, and it is in consequence of Prince's claim interfering, with the Land so assigned and conveyed, that Wilson complains. It is not possible, that Laffoor, could have been guilty of practising a fraud, by concealing a knowledge of this claim of Prince, from Wilson, at the date of their contract; for at that time, Prince's claim, had no existence. A survey made for Prince before Laffoor's fourteen acre survey was made, is spoken of in the depositions, and it is also shown, that Laffoor apprehended danger from a claim of Prince, founded on a county court certificate; but no such survey or claim is exhibited, and therefore we cannot regard either of them as existing. There is no foundation, on which to impute to Laffoor, a fraudulent concealment of a superior title from his vendee. Laffoor's survey for fourteen acres, (which is covered almost entirely by Prince's sixteen acres) was made on a Kentucky Land office warrant, 22nd July, 1822, and assigned to Wilson, 11th of June, 1823, and it was within his power, to have secured the eldest grant, and given his title full effect, from the date of his survey, had he registered his plat and certificate in proper time.

It must be shewn by the party asking the rescision, that the adverse claim he fears is superior, and covers his purchase.

There is proof in the cause conducing to shew, that the mill seat, that gives value to the land, was at one time equitably owned by Prince, who held William Rhea's bond for a title, and that Prince directed Rhea, to make the title to appellant and appellee while they were partners. We could not upon the facts before us, therefore, declare Wilson's claim to the mill seat, inferior to Prince's, if it had been shewn that his

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WILSON vs. LAFFOOR.

patent covered it. We are of opinion it does not, and that the survey in the name of Laffoor, calling for the meanders of the stream does. We see no error in the decree and proceedings in the court below.

The decree of the court below is affirmed. The appellee must recover ten per cent damages, decreed below, and his costs expended in this court.

CHANCERY.

Keith vs. Gore.

Case 5.

Error to the Montgomery Circuit; SILAS W. ROBBINS, Judge.

Parties. Arbitration. Rescision.

January 22.

Judge ROBERTSON delivered the opinion of the Court.

Statement of the case.

BENJAMIN GORE, in his bill filed in the Montgomery circuit court, against Gabriel Keith and others, charged, that he held by purchase, for a valuable consideration, a bond on Keith for the conveyance to him, of a tract of land in Montgomery county, and prayed either a specific execution, or a rescision and repayment of the consideration.

As the equity had passed from the first vendor through several intermediate purchasers, before it vested in Keith, all those purchasers and vendors were made defendants; on some of whom, process was not executed; but it having been returned executed on Keith, he answered. In this state of case, "the *parties*" (in the language of the record) *submitted* the matters in controversy to arbitration, and the arbitrators having returned an award directing the contract to be rescinded, and allowing to Gore $278 24 cents to be paid by Keith, the court decreed accordingly.

"The *parties*" in orders of court, only embraces persons before the court.

The person responsible for title may with obligee submit the question of

We are unable to perceive any error in this decree. The submission by "the parties" means only those who were before the court by service of process. It was not essential that process should have been served on all who were prayed to be made defendants, before Keith and others defendants, could refer the case. For the purpose of rescinding or executing the contract, Keith alone might make with the complainant a valid submission to arbitration. He alone was responsible for the consideration money, and for title to Gore. The

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others were included in the bill, only to aid in perfecting and quieting title. They make no objection to the decree, and it is not competent for Keith to object to it for want of parties. The appearance of the other defendants was not necessary for his defence or security, and he is bound by the award. NOLAND vs. JOHNSON, &c.

specific execution or rescision notwithstanding intermediate assignors.

The decree is therefore affirmed with costs.

Triplett for plaintiff; *Crittenden* and *Hanson* for defendants.

Noland vs. Johnson, &c.

CHANCERY.

Error to the Madison Circuit; GEORGE SHANNON, Judge. Case 6.

Set off in equity. Pleading. Usury. Jurisdiction.

Judge ROBERTSON delivered the opinion of the Court. January 22.

IN 1816, Jesse Noland executed his note to Richard Johnson for $100; on which (it being assigned to Shadrack Williams,) a judgment at law was afterwards obtained against him. Judgment at law.

Noland then filed his bill in chancery, alleging that Johnson owed him the amount of a note assigned to Noland on Johnson, before the assignment of the note to Williams; that shortly after the execution of the $100 note, he hired to Johnson a negro for the interest of the $100, which negro was worth $10 a month, and remained with Johnson six months. The bill also very unadvisedly mingles with these facts, claims against Johnson and others, as heirs of Vincent Turner, of whose estate Noland was administrator, charges that they owe him for expenses and time devoted to the business of the estate, and the management of suits in which all the heirs were parties; makes them all defendants, and prays for an account and general settlement. An injunction was prayed for and obtained, restraining the enforcement of Williams's judgment. Allegation of Noland's bill for injunction.

The answers deny that the heirs owe Noland any thing, but insist that he has never settled his administration accounts, or paid them their distributive in- Answers and cross bill.

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NOLAND vs. JOHNSON, &c.

terests; and being made cross bills, pray a decree against Noland for an account and distribution. And Johnson denies that he ever agreed to set off the interest of the $100 against the hire of the negro; but admits that he had the negro of Noland after the note for $100 was executed.

Decree of the circuit court.

Noland agreed, on the record, to abandon his claim in this suit against the defendants as heirs of Vincent Turner; and thereupon, on hearing, his injunction was dissolved, and bill dismissed with costs and damages; and a decree rendered that he should account to the heirs on their cross bills for whatever might be ascertained to be due by an auditor appointed by the decree. To reverse the decree dissolving his injunction and dismissing his bill, Noland prosecutes his writ of error.

Set off in equity, allowed only when there is a connexion between the demands, or complainant has not adequate remedy at law.

The injunction was improvidently granted. The individual claims charged on Johnson and others, in the bill, could not be applied by the Chancellor, as credits on the judgment, in favor of the assignee, (even if it had been right to join them all in the same bill,) unless, before assignment, there had been an agreement to allow them as credits, or they had formed parts of the "*res gesta*" with the consideration of the note. The note, and these demands, were separate and independent transactions. Even against Johnson, if the judgment had been in his name, and to his use, equity would not decree a credit or set off, without an allegation and proof of Noland's inability at law, to enforce their collection. The bill shews no claim to credit, except the hire of the negro.

Allegation, that complainant let defendant have a slave worth $10 per month, for the interest of $100, and the slave thus served defendant for six months, is not sufficient

In granting the injunction, therefore, the chancellor should have taken cognizance only of the claim to credit for the interest, during the time Johnson enjoyed the use of Noland's slave: And this according to the allegations of the bill and principles of equity, would have produced only *three dollars;* for Noland only claims credit for six months use of the negro; which, according to his own declarations, was to discharge the interest for six months. It is true, that he alleges that the negro was worth $10 a month, and therefore claims in his bill a credit for $60.

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But as he does not charge usury, he can only claim credit for the legal interest, which he says was paid by the use of his slave. Brown vs. Heard, 3rd Mar. 391. As it was apparent then, on the face of his bill, that Noland could only ask relief against the judgment, to the extent of the interest on the $100 for six months, (which is $3); the injunction was improperly awarded, and the Court had no jurisdiction over so small a sum; and that it had not, appears by the allegations of the bill, when tested by the well settled doctrines of equity. Hence the bill ought not to have been sustained.

to make a cause within the Statutes against usury.

An usurious agreement ought to be alleged.

But on the merits, it is very doubtful whether, if the amount had been sufficient to give jurisdiction, relief could have been given, by a perpetuation of the injunction for that amount, whatever it might be. In support of the allegation of a contract to set off hire against interest, there is only one positive witness, and he says that Noland told him, shortly after he took his negro from Johnson, that he had paid Johnson the money which he owed him. This witness does not know that the interest which was to be extinguished by the hire of the negro, was the interest of the $100 note; nor is this fact proved by any of the witnesses. They speak indefinitely, and refer to a date anterior to that of the note. It is extremely doubtful on a scrutiny of all the testimony, whether the negro did not work for the interest of some other debt than that of $100; and very probable, that his hire should not be estimated at more than $4 or $5 a month; and that he was in the possession of Johnson less than three months; and consequently the interest claimed to be credited, would be reduced to $1 50; as therefore the court improvidently granted the injunction; as it is very doubtful whether the plaintiff is entitled to any credit on the judgment; and if entitled to any, it is almost certain that it would not exceed $1 50 cts.; and Johnson, from any thing that appears to us, is able to pay that, (if due.) we have no hesitation in affirming the decree below.

Circuit court no jurisdiction to grant injunction for three dollars.

The defendant must recover his costs and ten per cent. on the damages below.

Caperton, for plaintiff; *Turner*, for defendant.

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PAYNE, &c. vs. COWAN, &c.

PETITION FOR A RE-HEARING.

Petition for a re-hearing.

MR. CAPERTON, *Counsel for the Plaintiff, respectfully solicits a re-hearing in this case.*

HE is well satisfied the Court will, on reflection, correct the opinion, if not entirely change it. The Court seem to consider the doctrine settled, that relief cannot be granted in any case on the ground of *usury*, unless it be relied upon in the pleadings. This idea is admitted to be sustained by the authority of the case of Brown vs. Heard, 3 Marshall, p. 391—referred to by the Court, in the opinion delivered. The authority of that case, however, is overruled by the cases of Rodes' Executors, vs. W. T. Bush, 5 Monroe, p. 467, 474–8, and of Turners Ex'rs and Freeman.

Upon a comparison of the testimony, and admissions in the answer of Johnson, the Court, he thinks, will feel inclined to alter its opinion. A rehearing is prayed.

The Court overruled the petition.

MOTION.

Case 7.

Payne &c. vs. Cowan, &c.

Error to the Henry Circuit; HENRY DAVIDGE, Judge.

Sheriff sales and returns. Executions. Motions. Notice.

January, 22.

Judge UNDERWOOD delivered the opinion of the Court.

Return of the sheriff on a *fi fa* endorsed, no security, that he had seized a slave as defendants property, and sold him to a certain person, for a certain sum, which leaves the execution entitled to a credit for so much, "*the money not paid*," fixes

AN execution issued in favor of the defendants in error against the plaintiffs, on which the sheriff made the following return, "Levied on one negro boy Tom, as the property of T. G. Payne, advertised and sold, on the 28th of October, 1826, and H. T. Woolfolk became the purchaser, for $145, which leaves a credit of $137 75. The money not paid, and not time to levy the balance." Said execution was endorsed by the clerk, "no security of any kind to be taken." On the 16th of March, 1827, the circuit court, on the motion of the defendants in error, without any notice, to the plaintiffs, who were defendants in the execution, or to Woolfolk the purchaser of the slave, and without a rule to show cause served on them, or either of them, quashed and set aside the said return

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of the sheriff. We cannot perceive any reason which should have induced the court to quash the return, unless it be, the statement that the "money had not been paid" and that we think, insufficient. It was the duty of the sheriff, under the execution, to make the money. He levied on a negro, and sold him as he states, for $145 to Woolfolk, "which (he says,) leaves a credit on this execution of $137 75." So far he was acting in conformity to his duty, and the authority given him by the execution, and his return, is evidence of what was done. But he adds, "the money not paid." In this he departed from his duty, and had no authority to make such a return, and therefore, we conceive it should have been disregarded by the court. See Dupey vs. Johnson, 1 Bibb, 567. If in fact, the purchaser did not pay the money, the sheriff should have disregarded his bid, and put up the negro for sale again. See Downing vs. Brown and Barbee, Hardin 181. Not having done so, but having returned a credit for $137 75 (being the amount left after deducting his commission from the $145,) we think he was bound to Cowan & co. for the amount, and in any proceeding by them against the sheriff for its recovery, he ought not to be permitted to say, or prove, that Woolfolk did not in fact pay him. The sheriff should not be permitted to take advantage of his improper acts, whether proceeding from ignorance, or design. Unless he is capable of discharging the duties of his office according to law, he should not undertake it. If he intentionally errs there is no excuse for him.

the credit on the execution and binds the sheriff to the creditor for the money.

We concede that courts may correct by motion, without notice or rule to show cause, many irregularities and errors, which may be found in the proceedings; but the errors thus to be corrected, must be apparent on the face of the proceedings.

Notice not necessary to correct errors in proceedings, when the grounds are apparent in the record.

If the error complained of is such as to require parol proof to establish it, then notice should be given, or a rule to show cause, entered and served, on the proper party. The case of Downing vs Brown and Barbee, already referred to, illustrates this doctrine. But believing as we do, for the reasons already assigned, that the statement in the return, that the money had not

Wherever the errors are not manifest by the record there must be notice by a rule served or otherwise.

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YOCUM vs. DANIEL.

been paid, should have been considered as a nullity, and that in other respects the return was substantially good there was in our opinion no such error apparent on the face of the proceedings, as authorised the court to quash the return. If there are errors in the proceedings of the sheriff in making the sale by which the defendants in error, have sustained injury, and which they can prove by oral testimony, if for instance, they desire to vacate the sale made to Woolfolk, the parties must be notified of the errors relied on, and time afforded them to prepare for trial.

As the record now stands, it is the opinion of this court, that the sheriff's return was improperly quashed and set aside.

The judgment of the court below is reversed, and the plaintiffs in error, must recover their costs.

Monroe for plaintiffs; *T. T. Crittenden* for defendants.

DEBT.

Yocum vs. Daniel.

Case. 8.

Error to the Montgomery Circuit; SILAS W. ROBBINS, Judge.

Duelling. Actions Qui tam. Rights of Trustees of Seminaries. Fines and forfeitures. County Levies.

January 23.

Judge ROBERTSON delivered the opinion of the Court.

Question stated.

THE only question necessary to be decided in this case is, whether a *Qui tam* suit can be maintained by an individual for his own use, and that of the Trustees of a county seminary, to recover the penalty of $500 forfeited by challenging to single combat.

Qui tam, the only action for the penalty incurred by sending a challenge to fight in single combat. The action cannot be maintained in the name of an individual and the trustees of Seminaries. The Commonwealth must be a party.

There is no doubt that *Qui tam* is the proper and only action in such a case. But we cannot admit that it can be maintained in the name of a seminary or its Trustees. The commonwealth should be a party.

The duelling act vests one moiety of the fine in the commonwealth; and the act appropriating certain fines and forfeitures to certain seminaries, does not vest the legal right in the Trustees until the collection and payment to them of the fines. We think that a fair construction of all the provisions of the act will authorise no other conclusion; and this opinion is fortified by the section which directs a motion by the

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clerk of the trustees, in the name of the commonwealth, against any officer of the law who may have collected and failed to pay over any fine, which the seminary has a right to receive.

If the trustees can claim, they cannot do so until the fine and forfeiture has been collected by the proper officer. But quere, whether fines and forfeitures to be recovered by *qui tam* action are appropriated to seminaries.

We are too, inclined to the opinion that no fines are appropriated to seminaries, except such as are wholly payable to the commonwealth, or in diminution of county levies. A moiety of a fine is not *the fine;* the expression fine and forfeiture, *ex vi termini*, means a totality: it cannot be considered a fraction of an entire penalty.

As therefore, the suit and judgment in this case are in favor of Daniel for his own use and that of the trustees of the Montgomery Academy, the judgment must be reversed and the cause remanded, to be disposed of as the principles of this opinion require.

Davis and *Triplett* for plaintiff; *Hanson*, for defendant.

Allan vs. Sudduth.

APPEAL TO C. C.

Case 9.

ERROR to the Hart Circuit; BENJAMIN MONROE, Judge.

Justices of the Peace. Appeal. Appeal bond. Condition. Statute.

January 23.

Judge ROBERTSON delivered the opinion of the Court.

ALLAN, against whom as plaintiff in the warrant, a Justice of the Peace rendered judgment for costs, executed an appeal bond with penalty of £50 with a condition to pay the amount of the judgment for costs by the justice.

Statement.

On motion, the circuit court quashed the bond and dismissed the appeal, either because the bond did not secure to the appellee (defendant before the Justice) the amount for which the appellant (plaintiff before the Justice) sued; or because the costs in the circuit court were not secured.

Judgment of circuit court.

Bond held good. Amount of judgment superceded is all that is required to be secured by the Act of 1812, increasing the jurisdiction of Justices of the Peace.

The court certainly erred; neither the letter, nor reason, nor object of the act of Assembly (second Digest 702) requires bond for any other purpose than to secure the amount of the judgment superceded. The bond in this case being sufficient for this purpose should not have been quashed.

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CONCLUDE vs. WILLIAMSON, ADM'R.

The judgment of the circuit court must be reversed and the cause remanded for new proceedings according to the effect of this opinion.

Triplett for plaintiff.

CHANCERY. ***Conclude, vs. Williamson, Administrator of Conclude.***

Case 10. Error to the Jefferson Circuit; J. P. OLDHAM, Judge.

Emancipation. Legislative power. Administrator. Slaves. Chattels. Assets. Creditors. Lien. Residuum. Escheat. Statutes.

January 24. Judge ROBERTSON delivered the opinion of the Court.

IN 1825, the Legislature of Kentucky passed an act, (see Session acts of 1824, p. 195,) declaring that the appellant, Zachariah Conclude, should be a freeman, and should inherit the estate of Isaac Conclude, his father, who being a free man of color, had died without heirs. Zachariah Conclude shortly after the passage of the act, instituted his suit in Chancery, in the Jefferson Circuit Court, against Williamson, who administered on the estate of Isaac Conclude, charging that the Administrator had in his possession assets amounting to at least $2500, and praying a decree against him for the amount which should be ascertained to be in his hands.

Complainant's Bill.

The Administrator admits in his answer, that he received of the estate of the intestate, $440 75 cts.; but alleges, that before the date of the act of the Legislature, he had expended $400 of that fund in the purchase of a daughter of the intestate, whom he purchased to emancipate, according to the intention, and in fulfilment of the repeatedly expressed wishes of the decedant in his life time; and whom he did liberate by Deed, immediately after the purchase. For this sum he claims a credit; and as to the remaining $40 75 cts., he objects to the complainant's right to it on the ground that, (as he alleges,) there are debts due to creditors of the estate, amounting to more than that sum, and that he is entitled to some compensation for his services as Administrator.

Defendant's answer.

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The evidence.

It is proved, that Isaac Conclude, in his life time, purchased the complainant; and had expressed a determination to purchase and emancipate his daughter, (afterwards emancipated by his administrator;) and at the time of his death, was making arrangements for the purchase. It is also proved, that he had deposited $200 with a friend to aid in the purchase, and directed him to make the purchase of his daughter, and set her free, if he himself should die before the desired object could be accomplished.

Bill dismissed.

The circuit court dismissed the bill, and the complainant has appealed to this court.

The main question which must decide this case, is to us, novel and somewhat perplexing.

The question.

It is necessary to ascertain the effect of the legislative act. 1st. Has it any influence on the rights of the parties? 2nd. What is the extent of that influence?

A slave not subject to escheat, but vests in Administrators or executors as assets for the benefit of creditors. Act of emancipation having passed, the subject of the act to be deemed free, until disfranchised. The liberty of a person of color thus situated, cannot be questioned collaterally, but only by one asserting a right of property, or a lien.

Although the legislature was mistaken in the opinion, that Zachariah Conclude had escheated to the commonwealth, (see 2nd Digest, p. 1156:) yet we concede to the sovereign power a qualified right to enfranchise him. If he vested in the administrator, it was chiefly for the benefit of creditors. Whether there are any creditors, does not appear; nor if it did, could it have any effect in this case. The operation of the act of assembly on them, can only be decided when they shall assert their rights, and resist its constitutional efficacy. If *quoad* them, he might be liable to sale, nevertheless, he must be recognized as a freeman, until they shall be able to disfranchise him, unless there may be some other objection, than the contingent rights of unknown creditors. If they were known to exist, and to be able to assert successfully their lien upon him, still, until they shall have done so, his liberty cannot be questioned in any suit between him and one who asserts no claim to him. As he did not escheat to the commonwealth, it might be urged that he would belong to the Administrator, if there are no creditors. It is not necessary to decide whether such interest in the administra-

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CONCLUDE, vs. WILLIAMSON ADM'R, &c.

tor, is the meritorious and indefeasable right, which the constitution will protect, in opposition to the strong claims of humanity, and the positive will of the legislature; the administrator not only does not assert any claim to the plaintiff in error, but admits that he is a free man. Hence, for all the purposes of this controversy, we shall consider him entitled to the civil rights guaranteed to the white man. The administrator having acquiesced in the act of manumission, could not, if he would, urge any personal right of his own, in opposition to its validity.

Administrator having assented to the act of emancipation, cannot urge any personal right to the party emancipated.

The question then arises—what is the plaintiff in error entitled to, of the estate of Isaac Conclude? The act of the legislature was designed to give him all the estate left at Isaac's death. If there had been real estate there could be no doubt of the power of the legislature to grant it, to whomsoever its will might direct it: because the realty would belong to the state by escheat. Not so exactly, however, of the personalty. In England, the King as "*Parens Patriæ*," holds all the real estate of intestate subjects, who leave no *heirs:* and as "*Ultimus Hæres:*" he can also hold the personalty. But by long usage, now grown into law, some person appointed for that purpose, takes the goods and chattels. The commonwealth of Kentucky, in like manner, holding a similar relation of sovereignty, to the citizens, is entitled to the realty, except slaves, left by an intestate citizen, without a legal heir. But we know no law of this state, or of Virginia, before the separation, which provides for the escheat of personal property. And the act which declares that slaves shall not escheat, provides that they shall "go as chattels and other estates personal:" Thus clearly negativing the idea, that personal property can escheat to the commonwealth. Must the personal property of Isaac Conclude, then be considered as derelict at his death? We know not to whom it belonged. The law would guard it, for the claims of creditors, and therefore an administrator is appointed. This property vests in him, in trust, for payment of debts. And the residuum left after payment of debts, having been vested in him by law, can be retained in his

The interest which is derived by the plt'ff in error, under the act of assembly, to the estate of the intestate. Difference between real and personal estates.

The act declaring slaves shall not escheat, provides that they shall go as chattels. Personal property of one dying intestate and without heir, is derelict.

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custody, and appropriated to his use. Whether it would be in the power of the legislature to take it from him, without his consent, it is not necessary in this case to decide. We have already *declined* to decide, whether, the right of the administrator, to the slave Zachariah, be such an one, as would enable him to resist the power of the legislature exerted in favor of human liberty. As he has waived all claim, and acquiesced in the act of emancipation, he cannot object that it was without his consent. And so it would be in relation to the other personalty of Isaac, if he did not resist the constructive operation of the legislative act, for reasons, entitled to the most gracious, and favorable consideration.

Influenced, by the most benevolent and commendable motives, the defendant appropriated $400 to the liberation of Isaac's daughter, who, is the sister of the plaintiff. This appropriation had been made, before the act passed, under which Isaac claims. We are not willing to concede, that after he had thus disposed of this sum, the act of the legislature could have, or was meant to have, the effect of making him responsible for it, out of his own estate. It seems to us, if it be yielded, that the legislature could take from him as much of the assets, as were in his possession "*nolens volens*," that it could not subject him to personal responsibility for that part appropriated, when there was no one in being, except himself, who had a right to it; nor could we ever believe, that the legislature would be willing, if it possessed the power, to take out of his private pocket, and put into Zachariah's, the price of the liberty of Zachariah's sister, purchased by disinterested benevolence, with the money scraped up in a life of toil and frugality, by her father, and by his reiterated and almost dying requests, consecrated to that humane object.

Zachariah had no right to this money when it was applied to the manumission of his sister. He then was a slave, and under the control of the administrator. But he is now, as he supposes, free, and is so, we have no doubt, with the qualification already indicated. Because his father had bought him, and died without heir, the legislature has declared him a free man.

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CONCLUDE vs WILLIAMSON ADM'R, &c.

and directed that he shall be entitled to his father's estate: And he is now endeavoring to abuse the liberty thus acquired, by denying the deft's right to apply a portion of the derelict funds of her father to the liberation of this same Zachariah's sister. Such a claim cannot be sound in *foro conscientiæ*"—It cannot be favored by the chancellor. Zachariah should have been content with his liberty, and rejoiced that a portion of the same, "saving's fund" which placed him in a condition to become free, had, in obedience to the injunctions of his provident father, rescued from slavery another of his children. Zachariah ought not to claim the $400, which redeemed his sister; much less ought he, if he could, to hold the administrator responsible for it. The administrator might have sold *him* before the date of the act of "24." If he had been influenced by cupidity, he would have done so, and retained the proceeds as well as the $400, and then Zachariah instead of being a plaintiff in this suit, might have been, and probably would have been, a slave. He does not present himself acceptably, in claiming; the $400 and we approve the decision of the chancellor, in which he forbore to aid an unjust enterprize.

Administrator not responsible in his own person, for estate of intestate dying without heir, when such estate has been appropriated, prior to a person being designated to receive; otherwise as to the estate which may remain unappropriated.

Still however, if the claim were clearly sanctioned by the law, we could not withhold from him his rights, however much we might disapprove the feelings which actuate him. But we are unable to establish for him any legal right to the $400 exchanged for his sister's liberty, independently of the consideration that the father had been saving money, for this generous purpose, and had made a deposit with a friend, in trust to be so applied; and independently of all consideration of the right of the administrator, against all except creditors and heirs, to enjoy the money, the fact that it had been appropriated before the legislative act passed, should be decisive of the mere legal right. At the date of the act, the $400 had been disbursed and was not in the administrator's hands when it was appropriated. Who was injured? Whose rights were invaded? There was no heir; no creditor complains; and the only other individual who had any semblance of right is the administrator himself. In the absence of an heir or creditor, who would have been entitled

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to the money? Not Zachariah, certainly. If an individual find money, for which there is no owner, and give it to a school or church, or to a colonization, or emancipation, or bible society, can the legislature, after such appropriation, apply it to any other use or give it to any other person? We think not. And we feel very sure, that the finder and donor could not be made responsible for doing with it as he had a right to do. If then it were conceded, that the administrator had no better right to this money than the finder of derelict goods would have to them, it is clear to us, that he is not responsible by law, (we mean the paramount law) to the plaintiff. If the plaintiff be entitled to any thing, it can only be the unappropriated balance in the hands of the administrator. This was all there was to give, when the legislature attempted to give. And we should have serious doubts whether this could have been given against the will of the administrator.

As however, he seems not to have objected, and has throughout, shown that he never asserted, nor never means to assert any personal right to the estate of the intestate; there should be no objection to Zachariah's right to the balance of $40 75 cents, after paying the administrator for his services, and creditors. if there be any, their demands. As however, there is no proof shewing that the administrator is entitled to extraordinary compensation, $40 would be more than the usual allowance. The court therefore, ought to have decreed to the complainant, the balance, after making a reasonable allowance to the administrator, on a refunding bond being executed.

Decree therefore reversed and cause remanded, that a decree may be entered, consistent with this opinion.

Denny for plaintiff; *Richardson* for defendant.

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CHANCERY.

Case 11.

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Beard, &c. vs. Griggs.

Writ of error to the Bourbon Circuit; GEORGE SHANNON, Judge.

Intestate. Trustee. Acceptance. Marriage contract. Execution. Sale. Slaves. Judgment. Bill for new trial. Chose in action. Warranty. Estoppel.

January 24. Judge UNDERWOOD delivered the opinion of the Court.

Statement of the title of the def't in error.

THE record in this case presents these facts. William Porter, Sen. had four children. Edward, William, John, and Jemimah; Edward and William both died before their father, intestate, and without issue. William died first of the two, at least such is the inference from the testimony. William Porter, Sen. for the last 12 years of his life was *non compos mentis*. Shortly after Edward's death, the father died intestate. Jemimah (who had been the wife of Henry Griggs, dec'd. and by whom she had six sons, of whom the defendant in error is one) on the 28th of June, 1809, executed a sealed instrument by signing her name and delivering it to one of the subscribing witnesses purporting to "make over and transfer two-thirds of all the estate, real and personal, which might, thereafter, descend to her at the death of her father, or that she might thereafter inherit from any of her relations, to Samuel Scott and Thomas Matson for the use of, and in trust for her six sons, &c." naming them.

Nature and extent of the trust attempted to be created by Jemimah Griggs.

The consideration expressed is, "the natural love and affection she felt for her children." The instrument authorizes the trustees to take possession of said two-thirds of the estate, whether real or personal, which might descend to said Jemimah at the death of her father, and to take care of, and superintend it, for the sole use and benefit of her sons named. The instrument then contains a clause by which the said Jemimah released and gave up to her children all right of dower to a negro named Cyrus, then in Virginia, belonging to the estate of her deceased husband, and all her interest whether to real or personal property, in her said husband's estate, and declared that the same should be vested in said trustees Scott and Matson, to be by them kept and preserved for the use and benefit of her said children.

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On the 29th of June, 1809, John Deatly, under his hand and seal makes an endorsement on said instrument, reciting that a marriage was about to be consummated between himself and said Jemimah Griggs, and that she had executed the same for the purpose of providing for the children of her former marriage; and thereupon consenting and agreeing to the same, in as complete a manner, as though he were bound by the "incorporation of his name in the deed," and having "his hand and seal subscribed and affixed at the bottom." On the 3d of July, 1809, said instrument was proved as to said Jemimah, and acknowledged by John Deatly before the clerk of the Bourbon county court, and admitted to record in his office.

Deatly, prior to his marriage with Jemimah, assents to the instrument, & it is recorded.

John Deatly, in January 1810, administered on the goods and chattels of Edward Porter, brother of said Jemimah, and on the 16th July 1810, the trustees, Thomas Matson and Samuel Scott and Richard Biddle, who had been appointed commissioners by the Bourbon county court, to divide the estate of said Edward, made out a report of their division of said estate, which was thereafter returned to the court, approved and admitted to record. In this division they set apart one third of the estate, real and personal, for said Jemimah, and they divided the remaining two-thirds among her six sons, allotting and assigning to the defendant in error, two slaves, Siney and Westley as his portion.

Deatly administered on Edward Porter's estate. It was divided. The slaves in controversy allotted to defendant in error.

In May, 1811, Thomas Kirkpatrick obtained a judgment in the Bourbon circuit court, against John Deatly as administrator of Edward Porter, deceased, execution issued thereon, which was replevied by Deatly. Thereafter an execution issued on the replevin bond, and Deatly surrendered Siney to the sheriff for the purpose of satisfying the execution. She was sold under the execution by the sheriff, on the 2d of November, 1811, and William Brown became the purchaser. He parted with the girl Siney, by sale to the plaintiff in error, Beard.

Judgment against Deatly as administrator, and said slaves surrendered & and sold.

On the 19th of October, 1821, Thomas Griggs, the defendant in the character of an infant, commenced an action of detinue in the Bath circuit court, against Beard, to recover Siney and two children which she

Suit instituted for the slaves by defendant in error, and determined against him.

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BEARD, &c. vs. GRIGGS.

then had. The suit was removed by change of venue to the Nicholas circuit, where it terminated in June, 1823, in favor of Beard, upon trial had on the general issue.

Griggs' bill for a new trial, &c.

Thomas Griggs in 1825, filed his bill in the Bourbon circuit court, against said Matson, as surviving trustee, and R. Cunningham, administrator of Scott, then dec'd, William Brown, and the plaintiff in error, Beard, praying for a new trial in the action at law, upon the grounds of having discovered since the trial, material evidence unknown at that time, and which he alleges would have changed the result, provided the court should be of opinion, that the legal title to the slaves in controversy was in him; but if the court should be of opinion that the legal title to the slaves was not in him, but abided in the trustees, that then the court would decree a title to be made to him, and that Beard, the present possessor of the slaves, be compelled to surrender them; and in the event, that his rights have been sacrificed by the negligence of the trustees, that then they be compelled to pay for the slaves, or that Brown be compelled to pay for them, if that should seem more just; and finally that all such relieif might be afforded as his case required.

The answer of Matson and Scott's administrator

The trustee, Matson, and Scott's administrator, answer and deny that said Matson and Scott ever accepted the trust, or did any act whatever as trustees, and the proof is clear that they did not; on the contrary, they refused to have any thing to do with the trust.

Amended bill

The defendant in error, by an amendatory bill, in substance, acknowledged the refusal of the trustees to accept the trust, and prayed for the appointment of a trustee to execute it.

The answer of Brown and Beard.

Brown and Beard deny their liability upon every ground, and Beard insists on the judgment in the action of detinue, as conclusive in his favor.

Decree of the court.

The court dismissed the bill as to Matson, Scott's administrator, and Brown, and decreed that Beard should surrender Siney and her increase to Griggs. The reversal of this decree is sought by prosecuting this writ of error.

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The validity of the instrument executed by Jemimah Griggs, is the first and most important question. Is it a good deed, and does it pass any title to those named as trustees, or to any others? The most approved writers, speaking of the requisites of every well made deed, declare it to be necessary that there should be a grantor, a grantee, and a thing to be granted, or in other words "persons able to contract and be contracted with, for the purposes intended by the deed, and also a thing or subject matter to be contracted for. See 2d Blackstone's Commentaries, 296, and Shepherd's Touchstone, page 55, volume 1st. The parties to this instrument, named as grantor and grantees, were able to contract and be contracted with; but did they contract? They did not, as we conceive. The stipulations contained in the instrument to make a contract, must have been assented to by the minds of the contracting parties. They must have *agreed* to these stipulations. Now, the proof is clear, that those who, by the instrument, are made the grantees, not only did not assent to the stipulations therein contained, but actually refused to abide by them, or to comply with them in any manner whatever. Again, to perfect a deed there must be a delivery of it. Now, if it be conceded that this instrument was signed, sealed and delivered, by Jemimah Griggs as her deed, still as the grantees never accepted but refused it, no title would pass to them in the thing granted. See Barlow vs. Hinton, 1st Marshall, 97. That a title cannot be vested in an individual by an instrument assuming the powers of a contract against his consent and will, is a proposition too clear to require argument or authority to prove. It is, therefore, plain that Matson and Scott never had any title to the property mentioned in the instrument executed by Jemimah Griggs. We have already stated that an essential requisite of a deed is, that there should be *a thing to be granted, or a subject matter to be contracted for.* Was the slave Siney and her increase the thing or subject matter contracted for in whole or part? We think not. We are of opinion that the thing or subject matter contemplated by the law, so far as the transmission o ititle from one to another is concerned, must be in *issee*; must have a substantive existence; must be good; choses in action, or a corporeal or incorpo-

To the validity of a grant it is essential, there should be grantor & grantee able and willing to contract, a subject matter in *issee* to be granted & a present interest in the grantor; tho' an instrument may assume the form of a deed, be delivered to any other than the grantee, and be regularly recorded, if it be not accepted by the grantee it is inoperative

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BEARD, &c. vs. GRIGGS.

real hereditament at the time of the contract, and the grantor must have an interest therein at that time. Now, what does the instrument executed by Jemimah Griggs purport to convey, so far as it affects this controversy? Does it purport to convey any property in existence owned by her at the time she gave her interest in her deceased husband's estate? It does not. It merely contemplates to make over and transfer two thirds of what she may inherit from her father and other relatives. *Nemo est haeres viventis.* It was uncertain when Jemimah Griggs executed the instrument, whether she would ever inherit any thing from any one. She might have died before her father or any from whom she could inherit. The instrument seems to have been intended to operate upon property which she hoped or expected to inherit. Such property we think cannot be affected by the contracts of heirs before descent. Descents are regulated by the rules of law, and cannot be changed by the contracts of parties; and we conceive that the heir can only convey or grant the estate after descent, there being nothing to grant before. A hope of inheritance neither lies *in livery* or *in grant*, and this is the first case that we have any knowledge of, where a person has undertaken to transfer by deed, two thirds of the property which might be cast on her by operation of law upon the death of relations. We think it cannot be done for want of a thing to be granted at the time of executing the instrument, and consequently, that the instrument executed by Jemimah Griggs, is to be regarded as a nullity so far as it affects this controversy.

The line of descent cannot be changed by deed. An inheritance in expectancy lies not in livery or in grant, and cannot be the subject of contract.

The defendant in error claims Siney and her increase under this instrument, as part of the property of William Porter, sen. cast by descent on his mother. Now, if she had made a deed conveying Siney directly to the defendant in error, in the life time of her father, such deed would have been inoperative and void; because the property was in the adverse possession of another. We cannot perceive how a deed merely making over a chance to get the property can be more effective.

If direct conveyance inoperative; conveyance of a mere chance equally so, under the same circumstances.

We are aware of the doctrine that where a person having no title, makes a deed and afterwards acquires

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title, that such after acquired title, enures to the benefit of the grantee as a general rule. But one of the exceptions to it precisely meets this case. In Jackson *ex dem.* McCracken vs. Wright, 14 Johnson's Reports 193, it is decided that no title not *in issee*, will pass by deed, unless it contain a warranty, in which case it will operate as an estoppel. See also Kircheval vs. Triplett's heirs for a case where a covenant of warranty will not operate as an estoppel; 1st Marshall, 493. Here there is no warranty and nothing *in issee* to be conveyed, neither is it a case where the grantor is claiming against his own deed as was the case, Jackson and another vs. Murray, 12 Johnson's Reports 201.

If grantor, with warranty, have no title at the date of his grant: after acquired title inures to grantee, by way of estoppel.

Putting aside the instrument executed by Jemimah Griggs, we will proceed to investigate the claim of the defendant in error, upon the other points presented in the record. We would, however, first remark, that we do not intend to decide what effect that instrument might have, considering it as between Jemimah Griggs and her second husband, John Deatly, in the nature of a marriage contract, and an executory instrument contemplating a settlement for the benefit of the children of the first marriage. We will not consume time by pointing out the want of analogy between the present case and that of Bunn vs. Winthop, referred to in 1st Johnson's Chancery Reports 329, further than to remark that the deed in that case operated in things *in issee*, and the controversy was confined to the claimant, under the deed and the representatives of the grantor. Here a stranger to the deed is concerned, who has been permitted to hold possession until Siney has had many children.

The next ground upon which title could be made out in the defendant in error, is, that the slaves in controversy, or Siney the mother, was allotted to him by commissioners acting under authority of the Bourbon county court, in dividing the estate of Edward Porter. Now, if the slave Siney never were the property of Edward Porter, then the division made, and the allotment of Siney to the defendant in error, as part of Edward Porter's estate, could give him no title. But it is very clear that the defendant in error was not entitled to any portion of the estates of either William or

Allotment of slaves, without delivery, by commissioners, acting under the order of a court of competent jurisdiction, in pursuance of an ineffective instrument, confers no title.

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Edward Porter, unless he can make out title through the instrument already disposed of; as therefore, the slaves set apart for him were not delivered to him or his guardian, we are of opinion that the division made in conformity to the instrument executed by said Jemimah, gives him no title. Jemimah Deatly and her brother John, were, according to the proof, entitled to the estates of their father, William Porter, sen. And her brothers William and Edward dying intestate before the father, he was entitled to their estates.

When a contract to provide for former children, entered into before second marriage, be actually executed by distribution of the property, according to its stipulations, & such children have had five years possession the court will not disturb, in favor of a creditor of the second husband, tho' the original marriage contract conferred on them no title.

Now, after the estate of the father had been divided between Jemimah and John, if Jemimah and her husband Deatly consented to divide their share among the children of Henry Griggs, deceased, as provided for in the instrument executed by said Jemimah before marriage, and did so divide their share and deliver over the property in pursuance of the division, we will not be disposed to question the title of the children after their possession has been continued five years. But in this case Deatly, who in virtue of his marriage, became entitled, surrendered Siney to pay an execution against him, and for which he had become bound individually by entering into a replevin bond, although the debt at first was only against him as administrator of Edward Porter. The defendant in error at that time had no title; the property had never been delivered to him. Siney was sold and Brown purchased her, and took possession. We think he and his vendee should be protected in that possession. Having decided against the title of the defendant in error, it is not necessary to notice other questions.

Decree and mandate.

The decree of the court below must be reversed, the cause remanded with instructions to that court to dismiss the bill filed by the defendant in error as it respects Beard, who must recover his costs in this court as well as the court below.

Crittenden for plaintiffs; *Feemster* for defendant.

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Case vs. Ribelin.

ERROR *coram vobis.*

Error to the Montgomery Circuit; SILAS W. ROBBINS, Judge. Case 12. J. J. Marshall 1 m 29 119 420

Writ of error coram vobis. Assignment of error. Demurrer. Plea. Notice. Supersedeas. Statute.

Judge ROBERTSON delivered the opinion of the Court. January 26.

WILLIAM RIBELIN sued George Case, in the Montgomery circuit court, in a petition and summons, and jugdment was rendered by default for the plaintiff, at the September term, 1824.

Statement of the case.

The execution on the judgment having been replevied, and another exeuction having issued on the replevin bond, on the 20th November, 1826; Case presented his petition on the 19th of December, 1826, to the judge of the court, praying for a writ of error *coram vobis*, on the ground that (as he alleged,) Ribelin died before the judgment was obtained, and filed his assignment of error, relying on this alleged error of fact. The judge having ordered a writ of error to issue and be made a supersedeas, a summons issued against William Ribelin, returnable to the first day of the next term, and a supersedeas bond was executed by Case and security, payable to *William Ribelin*: afterwards another summons issued against William Ribelin and John Ribelin, administrators of William Ribelin, deceased, returnable at the first day of the term, and a supersedeas bond was executed to *them.*

The sheriff having returned this latter summons "executed," the Ribelin's, as administrators, appeared in court, and filed a demurrer, which, after joinder, the court sustained, and thereupon rendered judgment against Case for costs and ten per cent damages.

The errors assigned in this court by the plaintiff in error, are first, that the court erred in sustaining the demurrer; and second, in giving judgment for costs and damages.

Rendition of judgment for or against a dead person, is error in fact, only to be corrected by writ of error, *coram vobis.*

If the original plaintiff, William Ribelin, died before judgment in his favor, (which is admitted by the demurrer,) the judgment was certainly erroneous; and as the error was one of fact, and not apparent on the record, the writ of error *coram vabis*, was the appro-

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CASE vs. RIBELIN.

priate, if not the only proceeding for exposing it, and rectifying the judgment.

The statute of 1802, does not apply to mode of correcting errors in fact, accruing before judgment; therefore, notice of application in this case not necessary.

The statutes of 1802, regulating such writs for the correction of errors occurring after judgment, cannot affect the mode of proceeding on errors before judgment. To ascertain the proper remedy for latent errors of fact or of law, existing before judgment, we must look for other authorities than this Kentucky statute. As to this last description of errors, the law is as it was before this statutory enactment; for there is nothing in the act which will allow such a construction, as can change or modify the law in relation to writs of error, except in the two classes of cases expressly provided for.

Errors of fact or of law, may and do frequently occur in judicial trials which cannot be corrected by writ of error to this court. If, for instance, a judgment be rendered in favor of or against a *feme covert*, suing or defending as a *feme sole*, or in favor of or against a dead man, which would be manifestly erroneous as soon as the fact shall appear; the error could be corrected only by the court, which rendered the judgment. This court could not notice it, because it does not appear on the record. There must be some remedy for such a case; and there are numerous authorities, shewing that a writ of error *coram vobis*, is the usual, and perhaps the only one. See 1st Rol. abr. 747; Cro. Ele. 7105; 3d Salk, 145; 2d Tidd's Prac. 1107.

Demurer to the assignment of error in the court below should have been overruled. When first process erroneous, and second process correct, and executed in time, the irregularity no error.

The demurrer ought therefore to have been overruled, unless the proceedings instituted by the plaintiff, have been in other respects totally defective or irregular. Some irregularities appear in the record, but they are deemed only formal. The most regular mode of procedure in this case would have been to issue a "*scire facias audiendum errores*," against the personal representatives; then, if the sheriff had returned that the original plaintiff, "William Ribelin is alive," he could have plead ,"*nullo est erratum;* otherwise, Ribelin being dead, and the process being returned executed on his representatives, the court could have proceeded to judgment conformably to established usage. Although this course was not strictly pursued, yet as a

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summons against the administrators, issued, and was served on them in sufficient time before the return day, the mistake or blunder committed in the first process, ought not to be considered material.

This not being a case provided for by the statute of 1802, notice is not deemed necessary to enable the plaintiff to apply for a writ of error and supersedeas; and if notice were necessary, the defendants, by appearing and pleading, have waived it.

Obligor in replevy bond, not estopped from correcting errors which occurred prior to judgment

Nor is the plaintiff, as is supposed in argument, estopped by his replevin bond, or barred by time. He can no more be precluded, by giving the bond, from the benefit of his writ to correct errors of fact existing before judgment, than he would be, from the right to a writ to remedy such as might occur after judgment, and before replevin; and there is no doubt that the bond in the latter case, does not cure the errors. This, almost all the cases which have occurred under the act of Assembly, as well as other authorities, prove.

Writ of error *coram vobis*, issuing prior to return of first execution in replevy bond in time.

Not intending to intimate what would be our decision, on the effect of time, if the writ had not issued in this case, as by statute it is required to do, for the correction of an erroneous replevin bond, before the first term after the date of the execution upon it, it is sufficient here to find, that the writ issued in this case within that time; and consequently, if by analogy, the limitation in the statute should be applied, it can have no effect on this decision. If it had been right to sustain the demurrer, there was no error in the judgment for costs and damages. See Hardin's Rep. Lansdale vs. Findly, 154; Rochester vs. Anderson, 2d Bibb, 569; Williams vs. Clay, 5th Littell, 58.

When error in fact well assigned, if sufficient, and its truth questioned, it should be traversed, & demurer proper when insufficient. Demurer admits that which is properly pleaded

The demurrer was proper in this case, although it is not the most usual and approved plea. When an error of fact is well assigned, the defendant should traverse the fact and try it by jury, if he mean to deny the error; but if it be true and not sufficient, he should plead "*in nullo est erratum*," and submit the decision to the court: but this plea is equivalent to a demurrer. See 2d Tidd, 1116, and Hardin, 154.

If the defendants had desired to traverse the allegation of the plaintiff, Ribelin's death, it should have

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been done by plea; their demurrer admitted it, as it was well assigned, unless it had appeared in the record that he was alive. It is a singular fact, that the first summons against William Ribelin was returned executed, but the proceedings afterwards contradict any inference from this, that the original plaintiff was then alive. Besides, the demurrer is to the assignment of errors; and being filed by the administrators, seems to admit the death of the intestate as alleged.

The judgment of the inferior court must therefore be reversed, and the cause remanded with directions to overrule the demurrer, and permit the defendants to plead, and on their failure to do so, to render a judgment of revocation on the writ of error *coram vobis*, and then suffer the original suit to be revived, and prosecuted in the names of the representatives. This may be very inconvenient, and even injurious to the administrators; but the law must be administered as it is. If William Ribelin was not dead when the judgment was rendered in his favor, the administrators may plead the fact; or if he still be alive, the fact can appear in the proper mode. But a demurrer to errors well assigned, can never be sustained.

Turner, for plaintiff; *Triplett*, for defendant.

COVENANT.

King vs. McLean.

Case 13.

Appeal from the Henderson Circuit; ALNEY MCLEAN, Judge.

Covenant. Warranty. Plea. Demurrer.

January 26.

Judge UNDERWOOD delivered the opinion of the Court.

Statement of the pleadings.

KING brought his action against McLean, founded on a covenant of general warrantee in a deed for the conveyance of a tract of land, averring overture by paramount title. McLean plead "that before the commencement of his suit, King conveyed the land, in the deed or covenant in the declaration, mentioned, to Samuel Burks, which will appear by said deed, a copy of which is to the court here shewn. If any right of action has accrued against this defendant, by reason of said deed, it has accrued to said Burks, and this he is ready to verify, &c." To this

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plea the plaintiff demurred; the court overruled the demurrer and gave judgment on the plea for the defendant.

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We do not believe the plea a good bar to the action. We admit that covenants real, pass with the land, and that the last vendee is entitled to his action on the covenant of warranty against any remote vendor, the intermediate conveyances operating as assignments of the covenant of warranty to the last vendee, who is entitled to recover the purchase money received by any of the antecedent vendors of the land. But it does not appear from the plea in this case when the deed was made by King to Burks. It is averred that it was done before the commencement of the suit, but that may have been, yet, King's right of action against McLean may have remained unaffected. The declaration avers that the land was recovered by judgment from King in virtue of a paramount title. Whether King had been turned off under the judgment, at the time he made the deed to Burks, does not appear. We think the legal presumption is, after judgment, that the possession is with the successful claimant, where there are no positive averments contradicting such presumption. Now, if King made the deed to Burks after judgment, and when King was not possessed, on the contrary when the possession was adverse to King's claim, then the deed from King to Burks would pass no interest in the land; and therefore could not operate so as to transfer King's right of action against McLean, consequent in the loss of the land, and which had become a mere chose in action, before the deed was made. This may be the case for aught that appears in the plea.

Plea, that prior to the institution of an action for breach of covenant of general warranty, the covenantee had conveyed the land to another, by deed, no bar, unless it appear from the plea that such deed is valid.

Making profert of a copy of the deed which is no where made part of the plea on record, and which copy may have had nothing official about it, and the contents of which are wholly unknown to this court, cannot cure the objection. The statement in the plea that the right of action accrued to Burks, is a mere deduction from facts, and not warranted by the facts as presented to us. We perceive no good objection to the declaration.

Profert of a deed and allegation of its operation, without making the deed a part of the record, no evidence of its contents or its effect.

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The judgment of the court below must, therefore, be reversed and the suit remanded, with instructions to the inferior court, to render judgment upon the demurrer as to the fifth plea in favor of the plaintiff.

The appellant must recover his costs in this court.

Denny and *Crittenden* for appellant; *Mayes* for appellee.

PETITION FOR A RE-HEARING.

DANIEL MAYES, Esq. *for appellee, filed a petition for re-hearing.*

Petition for a re-hearing.

As counsel for the appellee, McLean, I respectfully petition the court for a re-hearing, and briefly submit the reasons which influence me to do so.

The plea which your honors have adjudged bad on demurrer, as set forth in the opinion rendered, consists of three members, or parts.

First: the fact pleaded.

Second: a reference to evidence with an assertion that it will prove the fact.

Third: a legal consequence which results from the fact.

The *fact* pleaded as you have recited it, is "that before the commencement of his suit, King conveyed the land in the deed or covenant in the declaration mentioned to Samuel Burks." This is the essence of the plea.

The reference to the evidence and assertion that it will prove the fact, follows in these words, "which will appear by said deed, a copy of which is here to the court shown." The legal consequence which results, not from the evidence of the fact, but from the fact, is stated in these words, "if any right of action has accrued against this defendant by reason of said deed, it has accrued to said Burks." The second and third members of the plea are surplussage, and cannot vitiate the plea. In pleading it is only necessary to state the facts, neither the evidence of facts nor the law arising upon facts should be pleaded.

In the opinion it is said, "if King made the deed to Burks after judgment, and when King was not pos-

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sessed, on the contrary when the possession was adverse to King's claim, then the deed from King to Burks would pass no interest in the land; and therefore, could not operate so as to transfer King's right of action against M'Lean, consequent on the loss of the land, and which had become a mere chose in action, before the deed was made." I will not stop to controvert this conclusion. Let it be admitted, and what then follows, surely not that the plea is bad, but that it is not true; that King did not convey the land. The plea is not that before the bringing his suit he *executed a deed* to Burks for the land; but it is "that before the commencement of his suit, he conveyed the land in the deed or covenant in the declaration mentioned to Samuel Burks." A very different allegation indeed. I may execute a deed in all legal form, purporting on its face to convey a tract of land, but if that deed passes no interest in the land it cannot be said that I "*conveyed the land.*" When I aver that land is conveyed, I assert that the agent was so situated as to be able to convey or pass the land; and that being so situated, he performed an act which did pass it. The idea of a conveyance of land is a complex idea; the averment of ability to do the thing is included in the assertion that the thing is done. The active verb "to convey" signifies to hand from one to another; to transmit; to transfer; to deliver to another; to impart by means of something, &c. The noun substantive "conveyance" we define, the means by which any thing is conveyed; transmission; the act of transferring property; a writing by which property is transferred, &c. The definition in Jacob's law dictionary, volume second, page 60, is "a deed which *passes or conveys land* from one person to another. If these definitions be correct, (and that they are, cannot be questioned) it follows, that a deed which does not convey or pass the thing which it purports to convey, is not in any proper sense of the term a conveyance; and if a deed which conveys or passes nothing, is not a conveyance, the land which it purports to convey cannot be said to be conveyed. Hence, when M'Lean alleges that King, before the suit brought, "*conveyed the land,*" he alleges that the land did pass, when he adds that this fact will appear by a copy of a deed. It is true he does not so set out the deed as to show that his proof *will*

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Petition for a re-hearing.

sustain his allegation. When the deed is produced, it may or may not sustain it. Whether it does or does not, is a question that will arise on the evidence, not on the pleadings. What it will prove, can only be known when it is judicially before the court. Upon the present plea, that only exists which may exist, and must exist, in all cases; that is, an uncertainty, whether the plea be true, or false. The demurrer admits the truth of the plea, that is, "that before the commencement of his suit, King conveyed the land in the deed or covenant, in the declaration mentioned to Samuel Burks." This being admitted to be the fact, the consequence must follow "that if any right of action has accrued against the defendant by reason of said deed, it has accrued to said Burks;" and I cannot perceive how it can be, that any defect in the plea exists because of the allegation, that the *land was conveyed before the commencement of the suit.* Let the conveyance of the land have taken place when it may, the warranty passed with the land, and it is only, by supposing, that the land was not conveyed by the deed, that the court came to a different conclusion. But how can that presumption be indulged, when the plea is, that the land was in point of fact conveyed by King to Burks. I the more readily make this application as the point upon which the case is decided, and which I have endeavored to discuss, was not urged by the appellant's counsel, in argument; and consequently, I had no opportunity to submit my views. A re-hearing is respectfully asked.

D. Mayes, for M'Lean.

Judge UNDERWOOD delivered the opinion of the Court overruling the petition.

Rules in pleading. What necessary to be set forth in a plea.

IN this case it did not escape the attention of the court, that the fifth plea to which the demurrer was filed, and on which the cause was decided in the court below, averred that the plaintiff "*conveyed*," &c. We also knew and duly considered the technical meaning of the words used in the plea, and now having revised and maturely reflected on the opinion heretofore pronounced, we have determined to let it remain unchanged. It is very true that in pleading, it is only required to state the necessary and

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essential facts, and if more is stated, it may be regarded as surplussage, if it does not vitiate; but it is equally true, that all the facts must be stated which are necessary to shew the court that the party has good cause of action or defence, and to apprise the adversary of the points and grounds intended to be relied on. This should be done clearly and directly, and not by averring as facts the inferences of the party drawn from facts. It is the province of the court and jury, to make proper declarations from facts averred and proved. In this case the plea shews that the averment that King "conveyed the land" was the result of the construction put by the party on the deed, to a copy of which the court is referred and told, that it will so appear from the copy, meaning no more nor less than that the court would be of the same opinion with the defendent, upon an examination of the deed. Now, whether such a thing would or would not appear, or what opinion the court might or ought to form on looking into the copy of the deed, it is impossible for this court to say, for the reasons assigned in the former opinion. We, therefore, deem it too technical to overlook the popular use of the word "*conveyed*," when applied to a deed which is referred to, and a copy said to be shewn, and to adhere to its strictly legal meaning, when it is very clear to our minds, that the whole ground upon which the plea alleged the *conveyance*, was the construction put by the defendant on the copy of the deed referred to, and the execution thereof. In an action of debt the declaration would certainly be defective, if it only averred that the defendant was indebted a certain sum, as would appear by a copy of the bond from the defendant to the plaintiff, and to the court shewn. A demurrer to such a declaration should be sustained; and if so, it might with equal plausibility as in this case, be insisted, that the debt was confessed, and that judgment for it should be given. If the copy of the deed spoken of in the plea was an official copy from the records of the enrollment of the original in the proper office, and in the time required by law, then it was full and complete evidence, and the defendant had it in his power to set out clearly, the time when it was executed or took effect;

Averment that King "conveyed the land," inference of plaintiff, not the construction of the court.

When in pleading, the copy of a written instrument is profferred to the court, and not exhibited, words employed will be understood in their popular, not strictly technical sense.

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SWARTZWELDER vs. U. S. BANK.

having failed to do so, having failed to shew that King had parted with his title before eviction or loss of the land, and when there exists a violent presumption, he could have done it with accuracy; we will not by technical reasoning and critical niceties supply his omissions. The consequence may be to jeopardize, if not entirely to defeat a just demand against him. We see no objection, when the cause goes back to the inferior court, to giving the defendant leave to amend his fifth plea if it is reques ted. In such an event, if he has a good defence, and can shew that another is entitled to the benefit of the warranty in his deed, he can avail himself of it by proper averments.

Def't permitted to amend his plea in the court below.

FORCIBLE ENTRY AND DETAINER.

Case 14.

Swartzwelder vs. U. S. Bank.

Appeal from the Scott Circuit; THOMAS M. HICKEY, Judge.

Agent. Possession. Tenant. Corporate Seal. Authentication. Jury. Instruction. Traverse. Waiver.

January 26. Judge ROBERTSON delivered the opinion of the Court.

THIS is a case of "forcible entry and detainer," of a house in Georgetown.

Statement of the case.

THE bank as plaintiff in the warrant succeeded, and the judgment being affirmed in the circuit court, the defendant appealed.

The defence in the court below, was very elaborate; and the argument for the appellant in this court was ingenious. Many questions are presented; but as most of them have been well settled by the decisions of the appellate court, it is not necessary to notice them. The points urged most earnestly in argument, are, 1st. That the court below erred in instructing the jury "*that if they believed the evidence, they should find for the bank.*" And 2d; in refusing an instruction, that the evidence of the possession of the bank by the tenancy of an individual who leased from another, acting as agent of the bank, was insufficient, because there was no proof that the agency was created by the corporate seal.

As to the first, although the form of the instruction is unusual, we can see no valid objection to the deci-

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sion of the court upon it. The court cannot decide on the weight or credibility of the testimony; this is the exclusive province of the jury. But when the evidence which is competent, is altogether on one side, and if accredited, establishes facts, which being admitted, must decide the case for the one or other party, the court may tell the jury, that if they believe the evidence, the verdict should be for the party whose right it establishes. It is not denied, that the court may instruct the jury hypothetically, that if they believe certain facts, they should find in a certain way. What else, in effect, is the instruction in this case, that if they believe the testimony adduced, they should find for the plaintiff? None whatever; as that evidence certainly proved the facts, on the hypothesis of the proof of which the instruction is usually given.

Jury to determine upon the credibility and weight of evidence, when conflicting. When the testimony all on one side, the court may instruct hypothetically.

On the other point, there is no difficulty. If the tenant obtained possession from the bank, held as tenant under it, and recognized it as proprietor, the possession of the tenant was the possession of the corporation, although the agent who delivered the possession to the tenant, may have had no power of attorney authenticated by the corporate seal. The possession in fact, is the only question; and that can be as well proved without the authority to the agent by seal, as with it; and even without any authority whatsoever; and was abundantly proved in this case. The various other points, as already stated, have been so often adjudicated, that we shall forbear to touch them.

When tenant accepts possession from a corporation, and recognizes its ownership, it matters not whether the individual who delivers possession, be agent, it is the possession of the corporation.

Judgment affirmed with costs and damages.

Barry, *Depew* and *Chambers*, for appellant; *Wickliffe* and *Wooley*, for appellees.

PETITION FOR A RE-HEARING.

Messrs. DEPEW *and* CHAMAERS, *for appellant, presented a Petition for a re-hearing.*

Petition for a re-hearing.

THE counsel for the appellant would most respectfully represent, that, labouring under the deepest conviction, that the court in rendering their opinion in this cause, have, inadvertantly no doubt, not only left untouched, points which were made on the trial, and which are considered both weighty and conclusive for the appellant, if settled according to

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prior decisions of this court, but have assumed facts as proved by the record, upon which no legitimate evidence was offered whatever, he would consider himself criminally regardless of the interest of his client, were he not again to call the attention of the court to those points.

The warrant upon which the inquisition was held, complains that the appellant "did, on the 30th day of January, 1826, forcibly enter into, and detains from the said president, directors and company, of the bank of the United States, one house on a lot," &c. See Record, p. 1. And the verdict of the jury empannelled by the circuit court, finds "the defendant, Peter Swartzwelder, guilty of the forcible *detainure* complained of in the warrant." See Record, p. 5. And upon the verdict, the judgment of the court was rendered for "restitution of the *houses* and *tenements* named in the warrant." See Record, p. 5.

Now, let it be observed that the warrant does not complain of a forcible detainure. The qualifying term "forcibly," cannot by any grammatical construction be applied to the detainure. It is applicable only to the entry complained of, and the verdict, it will be seen, is made to rest wholly upon a forcible detainure, when in truth there is no complaint of a forcible detainure to be found in the warrant. If then, there be no foundation for the verdict, the superstructure must fall of course. A verdict in all cases, both civil and criminal, rendered for that which is not claimed or charged in the declaration, warrant or indictment, is both erroneous and void. Let us again advert to the case to which this court was referred on the trial, and which is now considered directly in point. It is the case of Lewis vs. Stith, decided by this court in 1822, and is found in 2d Lit. Rep. 296. In that case, the charge in the warrant was the same as in this, that the defendant forcibly entered into, and detains, &c. The verdict was for a forcible detainure only. The court of appeals decided that, as no forcible detainure was complained of, a verdict for a forcible detainure could not be sustained, and upon that ground reversed the decision of the court below. It is respectfully urged then, that the two cases are wholly analagous,

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and that this honourable court, has accidentally overlooked the point, or they would not have decided this as a point unworthy of notice, or one that in principle had heretofore been decided against the appellant. Nor would the court, except by accident, have passed unnoticed, the assignment of error that "the verdict of the jury and judgment of the court are informal, and substantially defective and erroneous, and contrary to law and evidence," when the warrant only charges a forcible entry and a detainure, "of a house on a lot," while the judgment directs the restitution of "houses and tenements."

The attention of the court, is also again respectfully called to the motion which was made in the circuit court, to quash the proceedings had by the sheriff under the original warrant, on the ground that no judgment was rendered on the verdict; and also on the ground that the inquisition was held on a day not directed by the warrant, without any agreement of parties to that effect, or regular continuance of the cause from day to day. That the circuit court had the power to quash on proper grounds, has, it is again urged, in effect been repeatedly decided by this court; and whether more substantial cause could exist, than the want of a judgment, when the statute expressly requires one, is here presented as a question to the court. The seventh section of the act authorizing the proceedings to be had, is full and peremptory, that a judgment shall be rendered, and even the judgment itself is substantially given. What then could be more fatal than the want of this judgment? Could the justice of the peace (if indeed, one was present at all,) have isued writ of restitution without a judgment? And if not, does the traverse taken to the circuit court, legalize the proceedings so as to place the appellant in a worse situation than if the original verdict had have stood untraversed? These are questions, if not at once conclusive, are deemed at least worthy of consideration; and especially the more so, when the record shews that the requisition was held at a time not directed by the warrant, thereby rendering the proceedings more void than vacuity itself.

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But there yet remains a question or two, upon which this court have acted, that imperiously claim, at the hands of counsel, some further notice. The opinion of the court as rendered, seems to leave the question out of view, as being not at all controvertable, whether or not the alleged agency of M. T. Scott to act for the bank, was proved by parol, and confines the enquiry solely to the question, whether or not the corporation could obtain and hold the possession in fact, of the house in question, without acting under its corporate seal; taking it for granted, that if the corporation can thus act, it is abundantly proved by parol, that such an agency existed. It is respectfully suggested that counsel has been greatly straitened to find on what page of the record such proof exists. It is true that Stiffee, who claimed to be tenant of the bank, and who was proved to have paid rent to M. T. Scott, as agent of the bank, had just left the occupancy of the house in controversy, when the alleged forcible entry was made. But it is also true, that Stiffee had previously held under Sebree, the transferee of the party now contended with the bank, and by the directions of Sebree, had attorned to Scott as agent of the bank, without the privity or consent of Hendricks, the real party now contended with the bank. Does not then, the question irresistibly occur—was Scott clothed with any power from the bank to accept of this attornment, and possession in fact constituting the "tenancy" upon which the opinion is predicated in favor of the appellees? If so, where is the evidence proving the existence of such agency? It is believed that it cannot be found in the record. It is true, Stiffee stated that Scott told him he was the agent of the bank, and he recognized him as such by executing leases and paying rent to him; but Stiffee also stated, that he did not know whether he was agent or not; and this, and similar testimony, from perhaps another witness, is all the evidence we have of Scott's agency. Scott never was sworn in court as a witness, as to his authority to act for the bank, and his mere say so, to one of the witnesses, is no legitimate evidence of the fact; nor can his acts as such, operate as proof of his agency, to the prejudice of one who had never recognized him as such, in the absence of all proof, that

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the bank vested him with the authority of an agent. Hence it results, that there is no proof that Scott was agent of the bank, and of course, no proof that the present appellees ever had the possession in fact of the premises in controversy, and consequently, are not entitled by law, to maintain the writ of forcible entry and detainure for the same.

But we will suppose for a moment, that some proof of Scott's agency was offered to the jury, and that *that* proof was slight or doubtful, as must be considered in this case; was not the circuit court travelling beyond the pale of its authority, when it snatched from the jury the decision of these facts, and decided them itself? Is it not the peculiar prerogative of the jury to decide upon facts, and not that of the judge? These are every day principles, and must be understood by every one having any pretensions to legal acquirements. And yet, the adverse counsel has, in his brief, chosen to regard these matters as "trifling," and this honorable court has so far exercised a coincidence of opinion, as to pass them almost unnoticed!

But admitting the agency of Scott to have been proved beyond controversy, by parol, with due deference to the opinion of the court, it is again urged that the authorities cited in the case, are clear, that a corporation, unless specially authorized by its charter, cannot do any act, except under the seal of the corporation. To acquire the possession in fact, requires positive action, and cannot be done by negative inertness, especially by a corporation. The possession in fact of the house in question, is proved once to have been in another, and all that has been done to change that possession, was done by Scott, and not by the appellees. Hence the ground taken by the court, that possession in fact can as well be proved to exist without authority on the part of him acquiring it, as with it, does not apply in the case, inasmuch as possession in fact of the house in question, is shown never to have been acquired by the appellees. Inasmuch, therefore, as it requires action, to acquire the possession in fact of that of which the party was once out of possession, this case forms no exception to the general rule, that a corporation shall not have power to act,

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except under its corporate seal, unless specially authorized by its charter. If the court intended in this case, to decide that the appellees could act without the solemnity of their seal, it is respectfully submitted to the adversary counsel to cite the authorities by which that decision is given.

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And upon the main question of controversy that came before the jury, which of the contending parties had the possession in fact of the house in question, suffice it to remark, that this court have approved the instructions given to the jury by the court below, that all the evidence offered on that subject, was on the side of the present appellees, and against the appellants; and however counsel may differ with the court on that subject, it is not intended here to be further investigated. But the court is respectfully solicited to reconsider as well, that, as the other questions herein suggested, and if, upon full consideration, they should coincide with any of the foregoing views, to grant to the appellant a re-hearing of the cause.

Uriel B. Chambers, attorney for appellant.

Judge ROBERTSON delivered the opinion of the Court on the petition for the re-hearing.

THE authorities and arguments urged in the petition for a re-hearing, had not escaped the consideration of the court; and as they were not believed to be sufficient to change the opinion which has been given, they could not be entitled to more influence on a reconsideration.

In a warrant for a forcible entry and detainer, the finding of either is sufficient.

The form of the inquisition is, we still believe, substantially good. On a warrant for a forcible entry and detainer, a finding of either the forcible entry or detainer is good; for either may be charged, and is remedied by the summary proceeding authorized by statute. We do not concur with the counsel in his criticism on the phrase "*forcible* entry *and* detainer." We think that the grammatical and sensible construction of these terms in the act, is, that the detainer as well as the entry is *forcible*. "Forcible entry and detainer," is a more appropriate and grammatical phrase to convey the idea of force in entering and force in detaining, than the more redundant expressions, "*forci-*

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ble entry and *forcible* detainer." The latter would be tautology. The copulative "and," connects the words forcible detainer with the word entry. And as one is with force, the other must have the same import. "He forcibly entered and *he* detains," might not necessarily and in strict propriety of language, mean that the detention is forcible; but "he forcibly entered *and* detains" would. If we were required to convey the idea of a forcible entry and forcible detainer in the most precise and unexceptionable language, would not that language be "forcible entry and detainer." These expressions in the warrant meant, and were intended to mean, that the appellant not only entered, but detained forcibly. Such would be our decision if we were bound to be very technical. But the statute regulating this proceeding is an extensively remedial one, and should be liberally and beneficially enforced.

Traverse puts in issue the truth of the inquest, and is a waiver of all irregularity.

Besides, the traverse takes issue upon the *truth* of the inquest, and is a virtual waiver of its form: 2d Bibb, 431–2. A warrant may be in the alternative for a forcible entry *or* detainer; and cannot for this reason be objected to after traverse: 4th Bibb, 501. And it is clearly intimated in Humphrey vs. Jones, 3d Monroe, 263, that an invalid warrant, as well as informal inquisition is waived by a traverse. Any other doctrine would render the remedy by warrant in the country vexatious and expensive; and would tend very much to frustrate the aims of speedy and cheap country justice, which it was framed to accomplish.

The case of Lewis vs. Stith, 2d Littell, 295, does not, when scrutinized, sustain the objection to the inquisition in this case. The decisive point in that case was, that the warrant charged a forcible entry, and it was proved that the plaintiff was not in possession at the time of the entry. It did not become necessary to decide, and therefore the court did not decide the question now under consideration. The court, it is true, used this language, "We are aware that in the warrant, the defendant, Lewis, is alleged, not only to have *forcibly entered* on the land, but is charged also with *detaining* the possession, &c." From this quotation it does not appear, that the lan-

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guage in the warrant, was "forcibly entered *and* detains;" and whether the language in that warrant was, by the words used, and their collocation and connexion, entitled to the same construction as those used in this, is not known. If they were, however, we should not feel willing to be controlled by an *obiter dictum*, which overrules the spirit and effect of a series of direct decisions, and which would be, in our opinion, plainly irreconcilable with reason and justice.

The force intended by the statute, is an entry or a detainer against the consent of the possessor.

Moreover, it should not escape observation, that the statute declares that the forcible entry meant by it, is an entry against, or without the will of the individual in possession. If then, an entry without the consent of the possessor, is a forcible entry; a detention against his will must be a forcible detainer. Therefore, when the warrant charges a forcible entry *and* detainer, the entry is forcible, because it was against the will of the possessor, the detainer must necessarily be forcible, because it is contrary to his will. The complaint in the warrant, is, that the defendant entered and detains, without the consent of the plaintiff. The law declares that this is a forcible entry and detainer; and that which makes it a forcible entry, renders it a forcible detainer; consequently, in the absence of any other consideration, it seems to the court, that on a warrant for forcible entry and detainer, a verdict for a forcible detainer, is good and responsive to one branch of the charge.

Quaere. Does a traverse dispense with the necessity of a judgment, upon the verdict before the justice of the peace.

The authorities already cited are sufficient to shew that the informality of the judgment, is unimportant, after a traverse to the circuit court. No writ of restitution can issue from the justice; but must emanate from the clerk's office. The traverse challenges the truth of the inquisition; and we are not sure, that in the circuit court, it would avail the objector, to prove, that there had been no judgment at all on the inquisition; by trasversing, he dispenses with judgment. However, it is not necessary to decide this matter now.

To shew that, if the tenant payed rent to the bank, entered as its tenant, and recognized it as its landlord. it is not material by what authority or contract he

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entered and held; and that his possession was the possession of the bank, only two cases will be referred to, to wit: Haynes vs. Adams, 3d Marshall, 140, and 1st Monroe, 126: in the latter of which it is decided, that if the tenant enter under a VOID contract, his possession is that of the landlord. But this point is so well established, that it is unnecessary to enlarge on it. It was therefore, as before decided, immaterial whether Scott was the accredited agent of the bank, as it was abundantly proved, that the occupant recognized the bank as its landlord.

Thus we have deemed it our duty to notice points which were not touched in the former opinion. This we considered due to the imposing argument of the counsel. Petition overruled.

Boswell vs. Clarksons.

CHANCERY.

An Appeal from the Bourbon Circuit; GEORGE SHANNON, Judge. Case 15.

Depreciated bank paper. Usury. Sale. Loan.

Judge ROBERTSON, delivered the opinion of the Court. January 27.

DOCTOR JOSEPH BOSWELL, having obtained a judgment against the appellees for $2500 and interest, in the Bourbon circuit court, and issued an execution to enforce the judgment, they filed their bill in chancery in the same court, avering that the consideration of the note on which the judgment had been obtained, was the loan by Joseph Boswell to them, of $1500 in notes of the bank of Kentucky, and $1000 in the notes of the bank of the commonwealth, which were, at the date of the loan, at a depreciation of 53 per cent; charging usury and praying an injunction and final relief. Allegations of complainant's bill.

Boswell in his answer, denies the charge of usury, and denies that the contract was one of loan, but insists that it was a sale. Boswell's answer.

He states that he owed James Morrison a large sum of money payable on the 6th of February, 1823, and had in his possession Kentucky bank notes, with which he intended to make the payment; but as the bank had refused to redeem its paper in specie, Morrison

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would not agree to receive it in discharge of his debt, and advised him to sue the bank or sell its paper on a credit, by either of which expedients he might convert the notes into specie. This he accordingly resolved to do, and the appellees hearing of his wish to sell Kentucky bank paper for the purpose of paying the debt to Morrison, proposed to him in Lexington, on the 29th of October, 1821, to purchase $2,500 of the notes. He states that they were fully apprized of his intention in offering to sell, and consulted Morrison before they bought; that they agreed to execute their note for the amount of the notes, payable in silver on the 6th of February, 1823, the day on which Morrison's debt was payable, and to allow him (Boswell) six per cent interest in paper until that time; and did execute their note accordingly. All the material facts relied on in the answer, are proved by the subscribing witnesses to the note, and by George Boswell, the latter of whom also proves, that Joseph Boswell directed him to pay over to the appellants, $2500 in notes of the bank of Kentucky, (being deposited with him) which he was about to do, but the appellees agreeing with him, to take $1000 in notes on the bank of the commonwealth, then equal to the other notes, he paid them that amount in commonwealth's paper, and $1500 in Kentucky bank notes.

Evidence in the case.

One witness for the appellees, swears that Boswell, in enquiring of him about their condition, stated that he had loaned them a large sum of money, which he was anxious to receive without defalcation, as it was intended for the payment of a debt he owed to Morrison, and due at the same time. Two other witnesses state that Boswell said that he had "let them have $2500," and their impression was that he meant a loan.

Decree of the circuit court.

The circuit court perpetuated the injunction which had been granted for the difference between specie and bank paper at the depreciation of 53 per cent, the rate of exchange in October, 1821, as proved by two witnesses.

Question for decision.

The only question for this court to decide, is whether the transaction between the parties was a loan or a sale?

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That depreciated bank paper, like stocks or other commodities, is a fit subject for contracts of sale or barter, we have no doubt; such paper is not money—it may and does answer some of the purposes of money by common consent; and in contracts or even statutes, particular circumstances may happen sometimes to concur in authorizing the construction that such a currency, was included in the expression, current money, or common currency, or even money in the abstract. But it is not the ultimate standard of value. It may be sold or exchanged for money, or property, or securities for money or property, without any imputation of usury.

Depreciated bank paper, not money; nor the ultimate measure of value. It may be the subject of sale without the imputation of usury.

Various opinions as to the prospective value of Kentucky and commonwealth bank paper, have been entertained and expressed, and this was peculiarly the case about the time that Boswell and the Clarksons made their contract. One man, in speculating on the future value of Kentucky bank paper particularly, would feel a strong confidence, that in a given time, it would approximate very nearly to, if it should not reach, the specie standard of value. Another, would as confidently apprehend that it would degenerate more and more, like the continental paper. The future value of the paper, like any other commodity in market, would necessarily be contingent and matter of speculation. If one individual, believing that Kentucky bank paper would be equal to specie in one year, should purchase it for his own promissory note, to the full nominal amount in specie, on a credit of two years, we cannot imagine why he might not so do; nor can we perceive any reason why the circumstance of giving his own note, instead of any other thing in exchange for the bank notes, would taint the contract with usury. It might be a slight circumstance, tending to strengthen others conducing to the proof of usury. But the contract could not be considered *per se* an usurious one.

If an individual execute his note for specie at a future day, in consideration of the present delivery of depreciated bank paper, whether for a greater or less amount, not evidence *per se* of usury.

The cases of Burnham vs. Gentry, and Collins vs. Secrech, decided by the late judges of this court, seem to have no application to this question. In both of those cases there was an acknowledged loan. Nor,

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on the other hand, do we feel the necessity of any support from the many authorities cited, to prove that there may be a sale of bank notes, stocks, annuities, &c. for a consideration greater or less than the value at the time of sale, without the infection of usury; without this formidable array of adjudication; the authority of reason, and the practice of mankind would be amply sufficient.

If a contract for borrowing and lending, this was certainly usurious.

Then was the inferior court authorized by the proof, to pronounce the contract in this case usurious? If it were a contract of borrowing and lending, it was certainly usurious, because, at the time, the thing borrowed was not worth as much by 53 per cent, as the amount agreed to be returned, and so it might have been on a sale of the paper, to an applicant for a loan. Second Johnson's Chancery Cases, 537. But without the reservation of interest by Boswell, we should decide that the contract was one of sale. The appellees did not ask for a loan; Boswell intended to sell. These facts would appear if there was no interest reserved. This is abundantly proved by those who were present when the contract was made; and the declaration of Boswell, (if ever it was made) that he had loaned the money, is so easily explicable, without contradicting the positive testimony of his witnesses, that even if it had been proved by two witnesses instead of one, it ought not to control the positive denial in his answer, corroborated by the testimony of two witnesses, present during the whole negotiation. But the reservation of interest, although it might have been made on a sale of securities, one for another, must be construed into evidence of a loan. If the appellants believed that the bank paper would improve, they might have been willing to promise to pay specie for it at a future day; or if they believed that on the 6th of February, 1823, the paper would be equal to specie, they might, and probably would have been willing to give their own note for more than the nominal amount in specie. But it is not probable that any such excess would be promised by a separate note for *interest*. It would have been included in the note for the consideration. The note for interest is a strong indication of a loan, and unexplained, should

The reservation of interest by a separate note, conclusive of the character of the transaction, and stamps it usurious.

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be conclusive. Day vs. Dunham, 1st Johnson's Chancery Cases, 193. WINN vs. YOUNG.

We are, therefore, constrained to concur with the court below, in its construction of the contract.

Decree affirmed with costs.

Wickliffe and *Woolley* for appellants; *Hanson* and *Depew* for appellees.

J. Marshall 1JJ 51 99 379

Winn vs. Young.

COVENANT.

Writ of error to the Clarke Circuit; GEORGE SHANNON, Judge. Case 16.

Covenant. Instruction. Interest. New trial.

Judge ROBERTSON delivered the opinion of the Court. January 27.

ON the 5th of March, 1825, William Winn filed, in the clerk's office of the Clarke circuit court, his declaration in covenant against John Young, on the following written covenant: "I promise to pay unto William Winn, son to James Winn of Clarke county, when he shall arrive to the age of twenty one years old, one hundred dollars with legal interest thereon, for value received, as witness my hand and seal this 2d day of October, 1817.

JOHN YOUNG, (seal.)

Attest—THOMAS WARREN."

Plaintiff's declaration. Covenant of John Young to pay plaintiff, when he arrived at the age of 21 years, $100, and interest thereon.

The defendant having filed two pleas, denying that the defendant was twenty one years old, and denying notice of the fact, on which issues were taken, a jury was sworn to try the issues; on the trial the plaintiff moved the court to instruct the jury, that they should find for him interest from the date of the note, which being objected to, the counsel for the plaintiff, and the judge concurred in a suggestion which was made, that it would be safest to calculate interest only from the time when the plaintiff attained legal maturity; and accordingly the plaintiff's counsel thereupon made the calculation by this standard, and the jury without retiring from the bar, found a verdict for the amount of principal and interest, as thus computed by the attorney.

Defendant's pleas. Intructions asked, by plaintiff's counsel. Waived upon suggestion. Verdict for plaintiff.

After the verdict was rendered, the attorney for the plaintiff moved for a new trial, on the ground that the

Motion for new trial overruled.

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verdict was for too small a sum. But the court overruled the motion and gave judgment on the verdict.

When the rights of a party have been wantonly or inadvertantly compromitted by counsel, a new trial should be granted to rectify such mistake.

Plaintiff entitled to interest from the date of the covenant.

There can be no doubt that the plaintiff was entitled by the contract, to interest from the date of the note. The language employed is susceptible of no other rational or consistent construction. It would be absurd to suppose that a note for the payment of money on a particular day, *with interest*, could be construed to mean, that the interest should commence on the day of payment, and not before, for the law would give interest from that time. It is perfectly evident, that in this case interest was payable from the date of the note, and consequently the plaintiff was entitled to a verdict for the principal and the interest calculated from that time. As the verdict was for a less sum, it was erroneous. And we cannot believe that the mistake or inadvertence of the counsel, in such a case, should debar the plaintiff from asserting his rights.

Verdict not the result of compromise of doubtful rights.

The verdict was not the result of a compromise of doubtful claims. The plaintiff's right to interest from the date of the note was clear, and the verdict resulted from the mistake of his attorney, which was produced in some degree by the suggestion of the judge; and we should doubt the power of an attorney to compromit the rights of his client, by any such act, whether wanton or inadvertent. At all events this mistake should not have any more effect than the very common errors in calculating of interest on notes in jury trials, committed or assented to by the attorney.

The verdict is for less than the plaintiff's covenant entitled him to. He had a legal right to the whole sum, compounded of principal and interest, from the date of the note, and the verdict ought to have been set aside, and a *venere facias de novo* awarded.

Wherefore, the judgment of the inferior court is reversed with costs.

Monroe for plaintiff.

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Caldwell vs. Caldwell.

CHANCERY.

Appeal from the Nelson circuit; PAUL I. BOOKER, Judge. Case 17.

Fraud. Recision. Misrepresentation. Allegations. Suggestio falsi. Jurisdiction.

Judge UNDERWOOD, delivered the opinion of the Court. January 27.

Statement of the case.

Complainant's bill prays a recision of the contract with defendant, on the grounds of fraud.

Decree of the court below.

Jurisdiction denied.

Bill dismissed.

Rule in chancery. When jurisdiction exercised.

Rule at law. Court had jurisdiction.

Allegation of false suggestion sustained

On the 23d of March, 1822, John Caldwell transferred to James Caldwell, without recourse, the benefit of a judgment, subject to various credits, obtained in the Logan circuit court, by John Jenny for the use of Austin Hubbard and said John Caldwell, against Aquilla Davis; said Austin, having previously assigned his interest therein to said John Caldwell. James Caldwell filed this bill to set aside the contract, and to compel John Caldwell to repay the money with interest, which was paid for the judgment, alleging that he had been defrauded by the misrepresentations of said John, in regard to the solvency and residence of said Davis, and as to a portion of the debt represented by said John, to be in the sheriff's hands and not paid over. The court below decreed a recision of the contract and a return of the money paid, with interest; to reverse which decree, this appeal has been prosecuted. The first objection made to the decree of the circuit court, is that the bill ought not to have been sustained for want of jurisdiction. Although the bill does not set forth the facts which constitute this as a case of *suggestio falsi* with as much clearness as might have been done; yet, we are of opinion that the allegations sufficiently shew, if supported by proof, that the complainant should have been relieved. The principles asserted in the cases of Hardwick vs. Forbes' administrator, 1 Bibb, 212, and Waters vs. Wattingly, 1 Bibb, 244, distinguish between common law and chancery jurisdiction. The general rule is, that where the whole contract is contaminated with fraud, and the parties can be placed in *statu quo*, the chancellor on the application of the party aggrieved, will interfere and do it; where that cannot be done, or where the injured party is unwilling to have it done, and the injury should be compensated in damages, then the party aggrieved must seek his redress exclusively at law; as where a vendor fraudulently puts off an unsound horse, the vendee has his

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HOWELL vs. FREEMAN.

election to go into chancery, for the recision of the contract *in toto*, or to bring his action at law to recover for the cheat, affirming the contract. The cases of Jones vs. Murray, 3 Monroe, 85, and others referred to, do not militate against the doctrines advanced. The case of White vs. Clark, &c. 3 Monroe, 390, and many others support us. The only remaining consideration is, does the proof sustain the allegations of the bill, and shew that John Caldwell deceived and imposed on James Caldwell by false suggestions, and thereby influenced and induced him to take the assignment of the judgment without recourse. Without commenting on the evidence, we are of opinion it does. It is therefore considered that the decree of the court below be affirmed.

Decree and mandate.

The appellee must recover his costs in this court and ten per cent damages on the amount decreed him by the court below.

Chapeze and *Wickliffe* for appellant; *Rudd* and *Hardin* for appellee.

CHANCERY.

Howell vs. Freeman.

Case 18.

ERROR to the KNOX circuit; JOSEPH EVE, Judge.

Evidence. Scienter. Suppression of truth. Injunction.

January 28.

Judge ROBERTSON delivered the opinion of the Court.

Evidence that the mare was unsound when sold to the complainant, not sufficient. If the *scienter* and fraudulent concealment had been established; as there was an offer to return the mare relief would have been granted.

THE evidence in this case did not authorize the perpetuation of the injunction. It is very doubtful whether the mare (to enjoin the price of which the bill was filed,) was unsound at the time of the sale; and if she were, it is not proved, nor can it be fairly inferred from the testimony, that the defendant, when he sold her, knew and fraudulently concealed the unsoundness. If the *scienter* and fraudulent suppression had been established, as there was an offer to return her, the injunction ought to have been made perpetual. But these charges not being sustained by the evidence, it is therefore ordered and decreed, that the decree of the circuit court be *reversed* and the cause remanded, that a decree may be entered dissolving the injunction, and dismissing the bill with costs and damages.

Cunningham for plaintiff; *Triplett* for defendant.

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Gordon vs. Ryan.

CASE.

Appeal from the Henry Circuit; HENRY DAVIDGE, Judge.

Case 19.

Sheriff. Capias ad satisfaciendum. Special bail. Surrender. Statute. Schedule. Justice of the Peace. Insolvent debtor's oath. Discharge. New trial. Bill of exceptions. Practice.

Judge UNDERWOOD delivered the opinion of the Court.

January 22.

RYAN brought an action on the case, in the Henry circuit court, against Gordon, the sheriff of Henry county, for permitting Griffith (against whom Ryan had recovered a judgment,) to escape from the custody of the sheriff, after he had been surrendered by his special bail, and prayed in custody. Ryan succeeded in the court below, and Gordon has appealed to this court. The first error assigned, questions the sufficiency of the declaration. We perceive no fatal defect in the declaration, especially in the last count. The averments set out with sufficient clearness, the institution of the suit by Ryan against Griffith, the holding him to bail, his surrender in open court by the bail in discharge of the undertaking of the bail, his being prayed in custody by the counsel for Ryan, his being ordered into the custody of the sheriff by the court or judge, the obtention of the judgment against him, and his escape permitted and suffered by the officer, in consequence whereof, Ryan, the plaintiff, alleged his debt was lost. These averments, we think, shew a good cause of action.

Action on the case against sheriff, for permitting the escape of a debtor surrendered by special bail, and ordered into custody by the court.

Sufficiency of the declaration examined.

The averments show a good cause of action.

Since the abolition of imprisonment for debt by the legislature, in 1821, see 1 Digest, 503, it has been decided in the case of Peteet vs. Owsley, 7 Monroe, 130, by this court, that special bail was not responsible to the plaintiff in the action, because no *capias ad satisfaciendum* could issue against the defendant. The third section of the act abolishing the *ca. sa.* authorizes a single justice of the peace to discharge a prisoner for debt, when "*committed* upon order requiring bail, or upon any, *capias ad satisfaciendum*," and such discharge is not made to depend upon the prisoner's surrendering a schedule of his estate, and taking the oath of an insolvent debtor, as the law was before. The fourth section of the same act provides, that the

Special bail not responsible since the act abolishing the *ca: sa:*

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discharge of prisoners "*arrested* under orders requiring bail, or a writ of *ne exeat*." Those provided for in the fourth section, are required to render a schedule of their property, and to take the oath of an insolvent debtor, as prescribed by the act of 1796; see 1 Littell's Laws, 547. We believe the *commitments* intended in the third section, are such as should take place under final process of execution, or by order of the court, when the debtor is surrendered by his bail. The *arrests* spoken of in the fourth section, allude to those which take place on *mesne* process. Griffith was committed, if ever in custody, by order of the court, and therefore his situation was provided for by the third section. Now, considering the operation of the decision of this court in the case cited, if the principle settled therein, should be permanently adhered to, and reflecting on the consequences of said third section, under which a justice of the peace could have discharged Griffith, without securing a schedule of his property for the benefit of Ryan; we, upon first impression, were inclined to say, that the sheriff should be irresponsible likewise, not perceiving any satisfactory reason on which to base his liability for suffering the escape of a prisoner, who may obtain his discharge on application to a justice of the peace, without the semblance of benefit to his creditor. But, knowing it to be our duty to observe the maxim, *ita lex scripta est*, rather than to act from considerations of policy, we feel ourselves constrained to regard the sheriff, as responsible as heretofore, for the safe keeping of debtors committed to his custody, and that if he suffers an escape, he must take the consequences, no matter how unavailing the commitment of the debtor may be, and notwithstanding his discharge is so easily had. It is the sheriff's duty to leave the discharge with the justice of the peace, where the law has placed it, and to guard against an escape.

That act examined, discussed and construed.

This case provided for by the 3d section of the act; and the debtor might have been discharged by a single justice of the peace, without surrendering a schedule and taking the oath of an insolvent debtor. Nevertheless the sheriff is responsible. *Ita lex scripta est.*

The next errors assigned, questions the legality of the decisions of the court below, in refusing instructions asked by defendant's counsel. The defendant by his counsel, asked the court to give two instructions to the jury. 1st, That one of Griffith's bail could not be released by surrendering him without the consent

Instructions asked by the counsel for the defendant and overruled by the court.

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of the other. And 2d; That one of the bail was still liable to the plaintiff, and that as plaintiff might pursue him and collect the money, if he was good for it, (there being no evidence to the contrary,) it should mitigate the damages. Both these instructions were refused by the court, and we think properly. Upon the surrender of the principal, before the return day of the first *scire facias* returned executed, or the second returned *nihil*, all the bail is discharged. The 14th section of the act of 1796, 1 Littell's Laws, 495, will admit of no other construction; and this principle, we think, remains untouched, notwithstanding the mutations the law on this subject may have undergone in regard to the responsibility of the bail. The first instruction asked, was therefore rightly refused, and the second being predicated on the first, properly suffered the same fate.

14th section of the act of 1796; I. Littell's Laws, p. 495: interpreted.

The last error assigned is, that the court refused a new trial. The evidence is all taken down and made part of the record; but there is no formal exception to the opinion of the court overruling the motion for a new trial. This we do not believe to be indispensibly necessary, although it is the most usual and approved course. The new trial is asked for, and that shews an unwillingness to acquiesce in the verdict and judgment. The evidence being all put down, enables this court to determine, whether the court below decided erroneously, in refusing a new trial. All things are exhibited on the record, and if error is apparent, we believe it our duty to correct it; and that we should not stop our ears and refuse to listen to a well founded complaint, because the party moving for the new trial, did not, when his motion was overruled, tender a formal bill of exceptions. It is enough, if the record shews the motion was made and overruled, provided, when all the evidence is put down, (which must be done,) it appears to us a new trial ought to have been granted.

Though it be more correct, when a new trial is asked and refused, to except to the opinion of the court overruling the motion; yet, if the evidence be spread upon the record, by bills of exception, if it appear from the record that a new trial ought to have been granted, the omission to take exception to the opinion refusing the new trial, is not fatal.

But it is urged in this case, that the bill of exceptions containing the evidence, should be altogether disregarded, because it was not signed, sealed, and made part of the record, at the term the judgment was rendered. After the jury found their verdict, the

The circuit courts have a discretion, as to the time which may be allowed to

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Gordon vs. Ryan.

court took until the next term to consider of the judgment; and at the term when judgment was rendered, the court gave the defendant leave until the next term, thereafter, to file exceptions. It is argued, that exceptions so filed, are void, and should not be regarded. This we do not concede. It is the duty of the court below, to allow the party exceptions as matter of right; and if time should be given from term to term, to prepare them, and that be erroneous, it would be making the errors of the court close the door against all redress to the injured party. It may often happen, and sometimes does, that important causes are not decided until the last hour of the term by the jury. In such cases, from necessity, the court must often take time to consider until the next term, and also give time to prepare exceptions. These things must be left to the sound discretion of the inferior courts. The points put down in the exceptions must be made and reserved in the progress of the cause, and if not, the party may waive the objection; but when the points are so made and reserved, they may be reduced to writing and placed in the record thereafter, at the discretion of the court. We will not say, that the inferior courts may not so abuse their discretion as to make it error; but in this case we see no such abuse. The court below seems to have been in much difficulty in relation to the proper disposition of the cause. Regarding the bill of exceptions and the evidence, therefore, as properly before us, it only remains for us to decide, whether the evidence justified the finding of the jury. To make an officer liable for an escape, it is necessary that the person escaping, should have been in the custody of the officer. The person must be taken, before it is possible that he can escape. Now, there is not a particle of proof to shew, that Gordon or any of his deputies, had taken or arrested Griffith, after he had been prayed in custody; nor is there any proof to shew, that Gordon and his deputies were in court at the time that the entry was made on the record, that Griffith had been prayed in custody. If they had been present, we are of opinion, that they were not bound to take notice of such an entry, and then to lay hands forthwith on Griffith, and hold him as a prisoner. We think the sheriff was not bound to do

prepare a bill of exceptions, as well as to the time when any point may be ruled, or question determined.

The bill of exceptions not being signed in the same term at which verdict is rendered, does not vitiate.

The points presented in the progress of a cause must be noted, and the right to except reserved.

Sufficiency of the evidence examined.

What requisite to create liability, in an officer for an escape.

That the principal was prayed in custody by his bail, insufficient.

The capture, or the actual custody of the person, by the officer should be pro-

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this, until directed by the court. It does not appear, that any such direction or order was ever given the sheriff or his deputy, by the court, nor does it appear that Griffith ever was in custody of the sheriff, after he was surrendered by the bail. He might, by order of the court, have been committed to the jailor, as well as to the sheriff. It does not appear that he was in the custody of either. He could not therefore have escaped, unless he was actually in custody, and as there is no evidence proving his arrest, or that he was actually in custody, or conducing to establish that fact, we think a new trial ought to have been awarded. We cannot indulge the presumption, that Griffith was in custody of the sheriff, from the single fact of the counsel of Ryan asking the court to commit him, when he was surrendered by the bail, even when that fact is connected with the official station of the sheriff. Such a presumption is too rash to justify or support a verdict. The whole case, as presented in the proof, seems to us rather to have shewn, that the sheriff did not take Griffith into custody. If he failed to do that, he is not answerable in this action. We were doubting whether the declaration was not defective, because it failed to aver that the sheriff had taken Griffith into his custody; but we settled down, that the averment that he suffered him to escape, necessarily included the idea, that he was in the custody of the sheriff. Both should be made out in proof; first the capture, then the escape. In this it has not been done.

ved in order to charge an escape, no such proof.

The judgment of the court below must be reversed, and the cause remanded with directions to grant a new trial.. The appellant must recover his costs.

Judgment & mandate of the court.

C. S. Bibb, for appellant; *Monroe*, for appellee.

PETITION FOR A RE-HEARING.

MR. MONROE, *counsel for appellee, moved a re-hearing.*

It is suggested with great deference, that the question of the authority, to revise here, the decision of the circuit court, overruling the motion for a new trial, when no exception was taken to the decision there, deserves farther consideration, before the power is exercised, and a precedent made. There is no such precedent in this court, nor elsewhere, known to the counsel.

Petition for a re-hearing.

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Petition for a re-hearing.

It is stated in the opinion delivered, that there is no *formal* exception to the opinion of the court, overruling the motion. And on this recognition of the state of the record, the question might be discussed; but there is, in fact, no exception upon this matter, *whatever*. The only bill of exceptions found in the transcript of the record, is the one filed at the term succeeding the final judgment, and in that the appellant complains of nothing, but the refusal of the court, to instruct the jury as he had moved; no mention is made of the new trial, nor is the motion alluded to.

The court goes on the ground, that the new trial having been asked, the unwillingness of the appellant to acquiesce in the verdict and judgment, is sufficiently shewn, and therefore, no exception to the decision, refusing to grant the new trial was necessary, that the whole of the evidence having been stated in the bill of exceptions, taken to the decisions, in the progress of the trial, this court can judicially notice the error of the jury.

These positions seem to be reasonable at first view, but it is respectfully insisted, they do not consist with the rules of law, as they are written.

The motion for the new trial, did shew the unwillingness of the mover at that time, to acquiesce in the *verdict*, but it could not have shewn the unwillingness of the party, to submit to the *judgment* of the *court* overruling the motion, because no such judgment was then rendered, and it could not have been known, what judgment the court would give. An unwillingness of the party, to acquiesce in the decision of the court, to amount to an exception to the decision, must be always manifested *after* the opinion has been pronounced; and, as the counsel would contend, this dissatisfaction with the judgment of the court, must be in the form of an exception to it. A motion to the court is one thing; an objection to a motion, or opposition to a motion is another thing: these come *before* the decision of the court; and an exception to the decision, is another thing: *it* comes *afterwards*, and is taken to the judgment of the court, by the party overruled. Now, if these views be correct, and if this

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unwillingness or opposition of the party, evinced by his motion for a new trial, *can* be taken as equivalent to an *exception* to *any* thing, it must be taken for his exception to the *verdict* which *had* been rendered, and not to the judgment of the court, overruling the motion for the new trial, pronounced one full term *afterwards*.

In other words, if shewing an unwillingness to acquiesce in the verdict, by asking for a new trial, be equal to an exception, still the *judgment* of the court, overruling the motion for the new trial, escapes by full three full months: and there is nothing on the record, shewing an unwillingness to acquiesce in that judgment. There is, indeed, no other entry on the record, at that or any other preceding term; but the prayer for an appeal, (which can, no more than can a writ of error, supply the place of a bill of exceptions,) and the bill of exceptions taken and filed *nunc pro tunc* to the decisions of the court, given on the trial, *before* the *verdict* was rendered, which, therefore, is no exception to even *that*, and much less to the refusal of the court, to set it aside three months afterwards. Indeed, the profound silence of this bill of exceptions, as to the motion for the new trial, filed the term after it was overruled, argues strongly that the party had acquiesced in that decision. But it is needless to rely on grounds of this sort. There is nothing in all the record, except it be the assignment of error made in this court, which brings into question the decision of the court, overruling the application for a new trial of the cause.

It must here be kept in view, that it is points of law, ruled by the *judgment* that the court can revise, and not decisions of the jury; and, therefore, the exceptions taken must be to his decisions. Or if a manifestation of unwillingness to acquiesce, shall be taken as equal to an exception, it must be an unwillingness to submit to the decision of the *judgment*, evinced *after* he has decided. These ideas are fully supported by the case of Walton vs. U. States, 9 Wheaton, 657–8; and, indeed, that case proves that the *formal* exception is indispensable. There the supreme court, in speaking of an objection taken by the government, to a bill of exceptions taken by Walton, after the verdict

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was rendered, use these words: "It is true the bill of exceptions states, that the evidence was *objected* to, at the trial, but it is not said that any *exception* was then taken to the decision of the court, so that, in fact, it might be true, that the *objection* was made, and yet not *insisted* on by way of *exception*." Here the difference between an objection to an apprehended decision of the court, and the insisting upon that objection, after the decision is given, by way of exception, is manifest. Walton's objection was probably made immediately before the court admitted the evidence, and, because he did not, *after* the decision, *insist* on his objection, *by way of exception*, the supreme court (who have never been charged with technicality) closed their ears to his complaints. In our case, the court was moved by the appellant, to set aside the verdict; and after one vacation of consideration, overruled, the motion and the appellant omitted, to even allege an objection to the decision, much less did he insist on his objection, by way of exception.

It makes no difference, that our case is of a motion for a new trial, and the case cited, was of an objection to testimony. The case of Goodridge vs. Goodridge 2 Marshall, 269, taken in connection with Walton's case, makes a case running upon all fours with the case at bar. In the case of Goodridge, a bill of exceptions was taken by the defendant on the trial, to the decisions given by the court, on points of instruction, as in our case; and in that bill, all the evidence was stated, and after the verdict was rendered, a new trial was moved and granted; but, as in our case, no bill of exceptions was taken to that decision. On the second trial, the jury found otherwise, and the plaintiff, for whom the first verdict had been given, brought the case here, and assigned for error, that the circuit court had erred in granting the new trial. But the court said, we do not think it necessary to decide on the question, whether the court below did right or not; for the plaintiff having acquiesced in the decision of the court, awarding the new trial, cannot be presented afterwards, to question its correctness. That the acquiesence here, means nothing more than the omission to insist on the objection to the new trial, by way of exception, is manifest from Walton's case.

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There *is* something imposing at first view, in the circumstance of all the evidence being found on the record, and that not sufficient to support the verdict; and a new trial refused, and an assignment of error in that decision of the judge; and if the court were left *at large*, it ought, doubtless, to revise the decision; but *ita lex scripta est*. Anciently no new trial could be granted by even the judge, who tried the cause. Afterwards, the judges presiding, exercised this power; but no writ of error lay to revise the decisions, granting or refusing the new trial, on any grounds whatever, even for errors upon questions of testimony, or instructions to the jury, until the statute of Westminster, 2, (spoken of by the supreme court, in the case cited, re-enacted in Virginia, in 1789, and here in 1798; 1 Digest, 188,) by which act the judges were required, whenever a party alleged an *exception*, to sign and seal it, and have it enrolled. Now, it is by this means and this only, alleging the exception (not merely making a motion, or making an objection, and after the decision, failing to insist on it,) and having that exception allowed, sealed and enrolled, that the decision of the courts of original jurisdiction, on motions for new trial and the like questions, can be revised by writ of error, or *an* appeal in the nature of it. It is adjudged, and precedents must be followed, that objections are not enough; the party must insist on his point by an exception. This is an act in the nature of a protest, challenging the error, and warning the adversary party, that it is reserved for revision. As to the error that may appear in the acts of the court and parties, by the *regular* parts of the record; I mean such as constituted the record before bills of exceptions were introduced; *these* shall be corrected without having been challenged when they occurred. Though advantages may be lost, we know in even this part of the case, by the party's omission to insist on the error in proper time and form.

Petition overruled by the court.

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CHANCERY.

Hoofman vs. Marshall.

Case 20.

Error to the Nicholas circuit, H. O. BROWN, Judge.

Parties. Injunction. Dismissal without prejudice. Process. Service.

January 29. Judge ROBERTSON delivered the opinion of the Court.

Statement of facts. HUMPHREY MARSHALL, as attorney in fact, prosecuted an ejectment for John Fowler to judgment, against Peter Hoofman and others; commissioners under the occupant acts, made a report of their assessment of improvements, &c. and Marshall, who seems to have been the only active and beneficial party, though not the nominal one, elected to receive the assessed value of the land recovered from Hoofman. The election was entered on the record as well as a deed executed by Marshall, as attorney in fact, and a bond to refund to Hoofman, on the event of his eviction by any other paramount title. Hoofman's land being valued to $262 50 cents. Marshall agreed to take Reynolds and security for it; and thereupon Reynolds and his security confessed judgment for the amount, and an entry was made releasing Hoofman.

Marshall reversed the case in the court of Appeals, by whose decision the report of the commissioners was quashed. As Hoofman was with others a denfendant on the record, Marshall, after the case was remanded, proceeded against him, as well as the others, and procured another assessment which valued Hoofman's land at 50 cents an acre more than the former report, for which judgment was rendered against Hoofman in favor of Fowler.

Complainant's Bill. To enjoin this judgment was the principal object of the bill in this case. In his bill, Hoofman, among other things, charges that he had sued Reynolds (of whom he had bought the land) on his bond for title, and expected to recover from him, more than the amount of the first assessment; that pending that suit for mutual accommodation, and to prevent unnecessary litigation, it was agreed between Marshall, Reynolds and himself, that Reynolds should confess judgment to Marshall for the assessed value of the land, and be released from Hoofman, and Hoofman from Marshall; that Reynolds and Ward, as his security, confessed

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judgment accordingly, and an entry was thereupon made, on the record, releasing Hoofman; that Reynolds had paid part of the said judgment, and the complainant had surrendered to him his bond for title; but that Fowler and Marshall were prosecuting their judgment on the last assessment.

Answer of Marshall.

Marshall admits the receipt of half of the amount of the judgment confessed by Reynolds, and denies the agreement to dismiss the suit as to Hoofman, or to discharge him from liability.

The evidence

There is no proof except records shewing the reports, judgments and release, mentioned in Hoofman's bill.

Subpœna on Fowler not served.

The subpœna vs. Fowler was not served, but only acknowledged by Marshall, as his attorney in fact.

Complainant's bill dismissed with costs.

The circuit court dismissed the bill at complainant's cost, and dissolved the injunction, except for the amount received from Reynolds.

Agreement alleged, not certainly proved, but rendered probable; effect if proved.

Whether the agreement set forth in the bill, is sufficiently proved by the record, it is somewhat difficult to determine.

If Hoofman released Reynolds on his confessing judgment to Marshall, we should incline to the opinion that Marshall's claim on Hoofman was thereby satisfied, and that he ought not to have proceeded farther against him. This act does not certainly appear, but is rendered very probable by the record, and the answer of Marshall.

Proper parties not made.

Reynolds and Ward ought to have been made parties: so that justice might have been done, without other suits. For if they are not responsible to Marshall, Reynolds should certainly be responsible to Hoofman. Hoofman should not pay twice for his land. Fowler too, ought to have been a party; the acknowledgment by Marshall did not make Fowler a party.

When a complainant, in chancery, shews good cause for the interposition of the chancellor; and an injunction granted, is perpetuated in part; it is

As it appears from the record, and from the decree, that Hoofman had good cause for filing his bill and obtaining his injunction, the court erred in giving costs against him, when his injunction was

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HAZZARD vs. SMITH.

error to decree costs against him.

perpetuated for part. There is no proof of any offer by Marshall, to credit the execution for the amount received from Reynolds, before the filing of the bill, as seems to have been supposed by the chancellor; but as Fowler was not before the court, it was erroneous to perpetuate any part of the injunction.

It is the duty of complainant to make proper parties and have the process executed. When neglected, not cause of absoblute dismissal of the bill.

The case was very unskilfully prepared. It was Hoofman's duty to have process executed on Fowler; and it was his duty to make Reynolds and Ward defendants.

The bill for the cause, however, ought not to have been dismissed absolutely.

Decree and mandate.

The decree must be reversed and the cause remanded, with directions, that the chancellor may, in his discretion, either dismiss without prejudice or give leave to make Reynolds and Ward defendants, and bring Fowler before the court, so that justice may be at once administered among all the parties; and Hoofman must recover his costs in this court.

Brown and *Triplett*, for plaintiffs.

APPEAL TO C. C.

Case 21.

Hazzard vs. Smith.

Error to the Green Circuit; BENJAMIN MONROE, Judge.

Plea. Set off. Replication. Demurrer. Amendment. Continuance. Practice.

January 31. Judge UNDERWOOD delivered the opinion of the Court.

Warrant, judgment of justice of the peace Appeal to circuit court.

HAZZARD as appellee of Mann, warranted Smith on an obligation, for the payment of $35, payable in current paper of Kentucky, and obtained a judgment before the justice of the peace. Smith appealed to the circuit court.

Declaration.

Hazzard filed a declaration in the circuit court, to which Smith replied by a plea of set off.

Plea of set off.

The matter of the plea, consisted in a note for $45, executed by Mann to Bland, who assigned it to Beard, who assigned it to Smith, the defendant; and the plea avers, that the assignment of this note to Smith, took place before Mann assigned his obligation to Hazzard.

Replications tendered.

To the plea of set off, Hazzard tendered two replications, one denying that Mann was indebted

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to the defendant, Smith, in the manner set forth in the plea before the assignment to Hazzard; the other denying that the note mentioned in the plea, was assigned to Smith, before the note sued on, had been assigned to Hazzard. The counsel for Smith objected to the filing of these two replications, and the court sustained the objection, to which Hazzard's counsel excepted. Hazzard's counsel then demurred to the plea, and the court sustained the demurrer. Smith's attorney then asked leave to amend the plea, which was allowed by the court, and the plea amended. Hazzard failed to reply to the plea as amended, but insisted on the right to waive the trial at that time, and to have the cause continued on account of the amendment made to the plea. The court refused to continue the cause, and gave judgment in favor of Smith, for want of a replication, to which Hazzard also excepted. The assignment of errors, questions the correctness of the opinions of the court excepted to as above. We think the court did right, in rejecting the replications to the plea. The object of all good pleading, is to arrive at a single point on which to form an issue, and if two replications can be filed to the same plea, a dozen may with the same propriety. By the same rule, two or more rejoinders might be filed to one replication, and thus, there would be no end to pleading. We know that a plea of set off, is regarded in the nature of a declaration; but we are not disposed on that account to indulge in a multiplicity of replications, a thing without precedent so far as we are informed, and if tolerated, would lead to perplexing consequences. Moreover, the replications if good, should have been verified by oath. See 3 Littell, 227, for the proper instruction of the acts of 1801 and 1812, upon this subject.

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Objected to & rejected.

Plaintiff demurs; demurrer sustained.

Plea amended.

Continuance moved by plaintiff and refused.

Judgment for want of replication.

The object of pleading to bring the controversy to a close, and reduce the contest to a point. Two replications to a plea, or two joinders to a replication, not admissable.

When it does not appear from the record, that an amendment is in so essential a point as to constitute surprise; the court below may have sustained a demurer, before amendment, the court of

There is nothing on the record which will enable us to determine that the court erred in refusing the continuance asked for. It does not appear what amendment was made to the plea. Whether it was the correction of a misrecital, not cause of surprise, as was the case of Watts vs. McKenney, 1 Marshall, 560, or the correction of something informal and not essential to the defence, cannot be told. If it were on either of these grounds, the plea was amended, and no other,

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FEEMSTER & AL. vs. JOHNSON.

the court was right in refusing the continuance. It may be urged, that as the court sustained the demurrer to the plea, we are bound to presume that the plea was radically defective, and that the amendment made was to cure a substantial defect, which would have entitled the party to a continuance, operating as a surprise. To this we answer, that the plea exhibited in the record as that to which the demurrer applied, if true, is a good defence to the action, and in what respect it was amended not appearing, we cannot indulge in a presumption that new matter, essential to the defence, was introduced when there was no necessity for it.

appeals will not infer that the amendment was so essential, or in a matter so material, as to consider it error in the court to have refused a continuance.

No presumption indulged in favor of a party, whose duty it was, and who had the power to make the fact appear.

Nor are we disposed to aid the party by presumption, when he failed to present on the record the precise character of the amendment which was made, as he should have done.

The judgment of the court below is affirmed.

Crittenden and *Haggin*, for plaintiff.

COVENANT.

Feemster & al. vs. Johnson.

Case 22.

Error to Montgomery Circuit; SILAS W. ROBBINS, Judge.

Current paper.

February 2.

Judge ROBERTSON delivered the opinion of the Court.

Judgment upon a note, stipulating to pay "current paper," when for more than the nominal amount of the note, erroneous. Not indispensable, to give the debtor the election to pay in Kentucky or Commonwealth's Bank paper.

IT seems to the court that the judgment in this case having been rendered, on a note for "current paper" for a larger sum than the nominal amount of the note, it is, therefore erroneous. It would have been better too, although, perhaps, not indispensable, that the judgment should have been for Kentucky or commonwealth's bank paper, thereby giving the debtors the election to pay either, as the contract might have been discharged in either.

Judgment reversed and cause remanded, that the judgment may be entered correctly.

Feemster, for plaintiff; *Wickliffe*, for defendant.

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Clarke vs. Castleman.

CASE.

Error to the Fayette circuit; JESSE BLEDSOE, Judge. Case 23.

Domestic bill of exchange. Notice. Non-suit. Instructions. Drawer and drawee. Allegation and proof.

Judge UNDERWOOD delivered the Opinion of the Court. February 2.

On the 6th of May, 1820, the plaintiff in error drew the following order in favor of the defendant, dated at Lexington.

Order drawn by Clarke in favor of Castleman.

"Mr. John Fisher, sir: Please pay to David Castleman or order, three hundred dollars, the balance due for a negro man, named Jim, that I purchased of the Fayette paper manufacturing company, and this shall be your receipt for the amount.

JOHN CLARKE."

Presented & protested. Suit instituted for the amount of the order, and judgment.

On the 9th of June, following, the order was presented to Fisher by a notary, and protested. Castleman then brought his action on the case, against Clarke, in the Fayette circuit court, to recover the amount of the order, in which he succeeded. To reverse the judgment of that court, this writ of error is presented.

The declaration determined sufficient.

The first error assigned, questions the validity of the declaration. We are of opinion that the declaration contains, substantially, a good cause of action. The case of Murray vs. Clayborn, 2 Bibb, 300, is very much like the present, and the declaration is of the same character. In that case, it was suggested, and we think correctly, that the objections now urged, came too late after a verdict and trial upon the merits.

Failure to shew notice of protest to the drawer of a domestic bill of exchange for non-acceptance or non-payment; or to account for the failure, is good cause for non-suit.

The next error assigned, grows out of an exception to the opinion of the court, in refusing to instruct the jury, to find as in the case of a non-suit. From the evidence before the court, at the time the instruction was asked for, and upon which it was predicated, we think the instruction ought to have been given; for at that time, there was no evidence to shew that Clarke had received due notice of the non-acceptance or non-payment of the bill by Fisher, or to account for the delay in having it protested. As the case then stood, the law would presume he had effects in the hands of Fisher. Therefore, he was entitled to notice, and the exercise of proper diligence on the part of the payee. See Baxter vs. Graves, 2 Marshall, 152.

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CLARKE vs CASTLEMAN.

But if non suit refused, and plaintiff afterwards shews that drawee had no funds of drawers, the defect is cured, and refusal to instruct, though at the time erroneous, no cause for reversal.

But the court having refused the instruction, the defendant below, and plaintiff here, introduced his proof, and has established by it to our satisfaction, that he had no funds in the hands of Fisher, and no right to draw on him; and consequently that he was not entitled to notice, and strict diligence from the payee. Laches in such a case, will not be imputed to the holder of the bill, as the drawer cannot be prejudiced thereby. Chitty on bills, 257-8-9. By this proof introduced by the defendant below, we conceive the error of the court, in refusing to give the instruction asked, has been cured, and that we ought not now to reverse a case, in which it was shewn before the trial was over, that the opinion of the court, though wrong at the time, has worked no injury to the party against whom it was pronounced.

Drawee having no authority to draw, nor funds in the hands of the drawer, is not entitled to notice.

The only remaining question, which arises from the instruction given by the court, on the whole evidence, to find for the plaintiff, if the jury believed the evidence on both sides, depends upon the right of John Clarke, to draw on Fisher, and upon the ground shewn for maintaining the action, in the name of Castleman. Had Clarke any right to draw the bill? Does the proof exhibit a right of action in Castleman? The learned counsel who urged the case for the plaintiff in error, contended for an affirmative answer to the first question, by attempting to shew that Fisher owed James Clarke, and that John Clarke drew the bill as agent for James. Such is not the purport of the bill on its face. Responsibility rests on John Clarke alone as drawer. There is no proof to shew that James Clarke ever promised, that Fisher might use his, James Clarke's funds, to discharge drafts drawn by John Clarke. Such a presumption cannot be indulged; because Fisher, at one time, made the absence of his note to James Clarke, and the consequent inability to enter credit on it, a cause of his refusal to accept; nor does it appear, what James Clarke has done with this note. He may yet collect it, if he has not already done so. John Clarke could not assume an agency, and draw for his brother's funds, although he might have designed a favor to his brother by it. We cannot, therefore, couple the drawer and James

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Clarke together, so as to justify the drawer in making the bill, upon the idea of having funds in Fisher's hands, subject to his control. In respect to Castleman's right to sue, we have no difficulty; although the slave belonged to the Fayette paper manufacturing company, and the bill of sale was made to James Clarke, yet the transaction may have constituted a good consideration for the order or bill in favor of Castleman, drawn by John Clarke, and that order or bill so drawn, may have been a complete satisfaction to the company, for the slave conveyed to James Clarke. A sells a slave to B, in consideration of which, C agrees to pay D so much money; D agreess to account to A, and B and C are to settle, C gives his note to D for the money, and A makes a title to the slave to B, we think it plain that D can collect the money from C. Such is the nature of the present controversy. It does not appear from the face of the bill, that Castleman was acting as mere agent for the Fayette paper manufacturing company. It seems to have been drawn in his favor, in his own right.

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The right of John Clarke to draw upon Fisher, and of Castleman to sue investigated.

John Clarke no right to draw.

Castleman's cause of action was good against John Clarke; affirmance.

We see no cause, therefore, to reverse the judgment. It must be affirmed with costs and damages.

Haggin and *Loughborough*, for plaintiff; *Richardson* and *Chinn*, for the defendant.

PETITION FOR A RE-HEARING.

P. S. LOUGHBOROUGH, *counsel for plaintiff in error, presented a petition for a re-hearing.*

The counsel for Clarke, respectfully ask of the court, a re-hearing of the cause.

In the opinion pronounced, it is conceded, that the circuit court should have instructed, as in case of a non-suit, when moved to do so by Clarke; but that this error was cured by the introduction of the proof, shewing that Clarke had no funds in the hands of Fisher. It is conceived, with much deference to the opinion of the court, that, in the state of pleading, upon which this cause was tried, the proof alluded to could not have had the operation supposed.

Petition for a re-hearing.

The liability of the drawer of a bill of exchange, is secondary and conditioned; arising only in the event

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CLARKE vs. CASTLEMAN.

Petition for a re-hearing.

of the drawee's default, and the use of due diligence by the holder of the bill, in having it presented for acceptance or payment, and notifying the drawer of its dishonor. Yet, if the latter have no funds in the drawee's hands, he is liable upon the bill, without notice. His liability in the two cases, though the same in its result, is yet, different in the mode, in which it is made out. In the one, it is the legal consequence of the due presentment and dishonor of his bill, and of notification thereof to him, in the time and mode prescribed by law. In the other, it results from his drawing the bill in bad faith, and with no expectation of its being honored.

In this case, the liability charged, is of the first kind. Payment is demanded of Clarke, *because*, after the use of due diligence by Castleman, he had failed to get the money from Fisher, and *because* Clarke had received due notice of it. These are substantially the averments in each count in the declaration, and the court suppose them to make out a good cause of action. There is not, in any one of the counts, either an averment or a suggestion, that Fisher had no funds of Clarke's in his hands. The many counts usual in these cases, are wanting; and the plaintiff proceeds against the drawer, wholly upon the ground of the liability deduced as stated.

The issue upon which the cause was tried, was upon the plea of *non-assumpsit*. This put the plaintiff upon the proof of every material averment in his declaration. In this he has failed; and the court say, that, had the cause rested here, he should have been non-suited. But the defendant himself is unfortunate enough, to furnish the proof upon which he is charged. The court think the depositions introduced by him, shew that he had no funds in Fisher's hands. Suppose it admitted. Does this fact make out Clarke's liability as charged? Is the declaration better sustained by the proof than before? Is the averment of due diligence in Castleman, or of legal notice in Clarke, supported by the evidence? Certeinly not. But it is said, that upon the case as now exhibited, Clarke had no right to notice. This conclusion, it is readily admitted, is correct, if the evidence, as the court supposes, satis-

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factorily establishes the want of effects in Fisher's hands. Still it is not perceived why it should avail Castleman, as the pleadings existed. He supposed it was incumbent upon him, to use due diligence, and give notice to Clarke, that the liability of the latter was consequent upon the performance of these duties, by him, and he has averred that performance. By so doing he has deprived himself of the liberty he might have had, under a suitable allegation of shewing an excuse, for not giving notice. His pleading should have conformed to the fact. Clarke should not have been held to answer to a liability, made out in one mode in the declaration, and when he had succeeded in doing so, been made to fail, by proof, any way obtained of a fact, of which the plaintiff's pleading gave him no notice, in no way connected with the liability stated, and indeed, wholly out of the issue.

If the defendant had pleaded specially, that he had not received due notice, and the plaintiff had replied, that there were no effects in the drawee's hands, it would, according to all rule, have been a departure and ill. The court would not have permitted the plaintiff to have changed his ground.

If the plaintiff allege, that the bill was presented, and payment refused, he cannot support it by proof, that the maker could not be found when the bill was payable. 2 Phil. Ev. 19; Starkie Ev. part 4, page 254.

When notice is averred to have been actually given, it must be proved as laid; if in fact it has not been given, the declaration should state the reason why it was not done. 6 Mass. Rep. 306; 2 Phil. Ev. 34 note.

If no demand is made of the maker, and a sufficient excuse exists, that excuse and not an averment of due presentment, should be averred in the declaration. 5 Mass. Rep. 170.

This court, in Frazier vs. Harvie, 2 Litt. 180–5, fully recognize the principle here maintained. The declaration there presented the liability of Frazier, the drawer, upon both the grounds of due diligence, and notice, and of want of effects in the drawee's hands. The bill of exceptions stated, that Harvie

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CLARKE vs CASTLEMAN.

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failed in proving notice as alleged; but the court refused to instruct the jury to find for defendant. Yet, because the bill of exceptions did not purport to contain all the evidence given, this court presuming that proof had been given, of the want of funds in the hands of the drawee, affirmed the judgment in favor of the plaintiff. Upon re-consideration, the court said, that if there had been no allegation of the want of effects, "it would have been indispensably necessary to have proved the notice of the protest "as laid." And they adhered to the opinion affirming the judgment, because they considered the declaration to contain the necessary averment. This case, then, establishes the rule, that, to enable a plaintiff to rely upon the want of funds, he must aver it.

Here there is no such allegation. Castleman, therefore, it is believed, could not have introduced testimony upon the subject. It was not proper for enquiry; and the reason is not perceived why, when the law, thus authoritatively pronounced by its highest expounders, forbids the party to introduce evidence of a fact not in issue, the court will permit that fact to avail a plaintiff, who has framed his declaration without a proper view of his case, and has utterly failed in the opinion of the court, in making out by proof, the cause of action set forth in it.

If these views are correct, the declaration was no better supported by proof, at the closing of the testimony, than when the non-suit was moved; for as the bill of exceptions gives *all* the evidence, the court can know, that, so far as regarded the proof of diligence and notice, it was insufficient to maintain the issue on the part of the plaintiff, and that as regarded the matter of excuse, for the want of notice, it was irrelevant.

Hence it is conceived, that the error in refusing a non-suit, was not cured; and that the court erred in instructing the jury upon the whole case, to find for the plaintiff.

As to this last instruction, it is believed to have been erroneous, when tested by the case of M'Pherson vs. Hickman, 1 Monroe, 170. By the principles

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there laid down, the court, in this case, had no right to give the instruction, that if the jury "believe the whole evidence on both sides, they must find for the plaintiff."

CLARKE vs. CASTLEMAN.

LOUGHBOROUGH.

Upon which the court delivered the following opinion.

In the opinion heretofore delivered in this case, the varience between the proof upon which the judgment of the circuit court was sustained, and the allegations of the declaration escaped the attention of the court. The proof shewed that there was no funds of the drawer in the hands of the drawee. There is no averment in the declaration, which properly admits the evidence on this point. Whether the drawee had funds or not, was not in issue; and therefore, the defendant might well allege surprise by the admission of testimony, as to a point not in issue, when such testimony is made the basis, on which to support the verdict and judgment against him. The verdict and judgment are not defensible, unless they can be aided by the proof, that the drawee had no funds. We are now of opinion, they cannot be so aided. The case of Frazier vs. Harvie, 2 Littell, 185, is in point, and shews that evidence ought not to be received, proving a want of funds in the hands of the drawee, unless it be so averred in the declaration.

The allegations in the declaration, did not permit the proof of no funds in the hands of drawee; the admission of such proof erroneous.

The judgment of the circuit court, must, therefore, be reversed, and the cause remanded, with directions that the plaintiff have leave to amend his declaration, so that new proceedings may be had, not inconsistent with this opinion.

Judgment & mandate.

The plaintiff in error must recover his costs.

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CHANCERY.

Rowland vs. Garman, &c.

Case 24. Error to the Warren Circuit; HENRY BROADNAX, Judge.

Contract for land by parol. Statute of frauds. Recision. Parties. Dismissal of bill absolutely or without prejudice. Practice.

February 2. Judge ROBERTSON, sitting alone by consent, delivered the following opinion.

Bill, answer and proof.

ALTHOUGH the bill alleges that the contract for land, which it seeks to rescind, was not reduced to writing, the only defendant before the court refuses to admit it, and the complainant has taken no proof; but if it be conceded that the contract was parol, it does not follow that the chancellor will, for that cause alone, decree its recision; unless it be reduced to writing conformably to the statute of frauds, no suit can be maintained on it, if the fact of its not having been written appear; nevertheless it may be good between the parties under some circumstances, and for some purposes.

No suit can be maintained upon a parol contract for land. Contract not *ipso facto* void.

Party in fault cannot be relieved in equity. If one party performs, the other cannot refuse.

The chancellor will never interfere and relieve one party from it, if the other has complied with his contract, or is willing and able to do so. If the vendor is not delinquent, the purchaser has no right in equity to a recision. A court of chancery will not lend its aid to the perversion of justice, on the petition of the party in fault.

The character of Garman's sale. Plaintiffs might have obtained title. Proper parties not made.

In this case it is evident that Garman did not sell the legal title, and was never expected to convey it; but that the son of the complainant, Rowland, who held the title, was to make it to the appellants. And it not only does not appear, that there was any inability or unwillingness to convey, but it is quite clear, that the appellants might have obtained the title. It is equally plain that they do not desire to obtain it. They have never applied for it: they have not made the holder of it a defendant, nor have they had publication made against the vendor Garman, who is a non-resident. Their only object seemed to enjoin the payment of the purchase merely until "a more convenient season."

If proper parties, decree of

If all the parties had been before the court, the decree should have been as it was; unless it had been

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made to appear that Garman was bound by contract to make the title; and that the holder of the title was unable or unwilling to convey; but as the proper parties were not before the court, the absolute dismission of the bill was erroneous.

the court below correct. But dismissal of the bill, absolutely error.

If, under a different aspect, this court might in reversing for want of parties, leave the case open on its return, nevertheless, as the complainant below seems to have intentionally failed to make the proper parties, for the purpose of giving to their case a more specious semblance of equity, and of preventing a clear disclosure of their want of title to relief, and as nothing which has been made to appear indicates a probability that their case was, or could be made a meritorious one.

When a complainant in chancery has been guilty of gross neglect, in making proper parties and that failure may be attributed to finesse, the court will direct the bill to be dismissed; but without prejudice.

The decree must be reversed, and the case remanded, with instructions to dismiss the bill without prejudice, and each party must pay his own costs.

PETITION FOR A RE-HEARING.

THOMAS B. MONROE, *counsel for complainant presented a petition for a re-hearing.*

Petition for a re-hearing.

I ASK for a reconsideration of this case with great reluctance, but I believe it is my duty. If the court had done no more than to reverse the decree, dismissing the bill absolutely, and directed the dismissal without prejudice, because Garman had not been made party, I should not have said one word, because I would have supposed the decree according to the settled course of practice. Indeed, nothing else would have been contended for, had it not been for the case of Hoffman and Marshall; in consequence of that case, a hope was entertained, that the court seeing the merits of our case, would give us leave to have a publication against Garman, and the controversy settled without a new suit; but the court has decided that we have no merit. On this point a reconsideration is respectfully asked.

It is true one bill is brought to enjoin a judgment, on the ground, the obligation it was recovered upon, was given for land we had purchased of the obligee, for which he has given us no obligation in

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writing; but there is another ground distinctly taken in the bill—that the obligee, Garman, who had contracted to sell us he land, had no title to it. Let it then be granted, the contract was not by parol; and suppose, as the defendant has not admitted, there was no writing, that Garman's obligation to convey the land. There is then the allegation of his lack, indeed, total destitution of title; which is admitted in the answer of Edwards. For he insists on this fact, and he admits it in so many words, that the complainants did purchase the land of Garman; and the note, the judgment was recovered upon, was given for a part of the consideration, and he says over again, that it was from Garman the purchase was made. Then the bill and answer present a clear and simple case of a bill, to enjoin a judgment on the ground, that the consideration of the note it was recovered upon, was an executory contract for land, to which the obligee who sold to the obligor of the note, had and still has no title. I say nothing here of parol agreement. Let it be granted Garman was bound by writing. And then, can there be a doubt of our right to relief on this case. I will not cite an authority to prove it; but an attempt is made to make the case otherwise. It is alleged in the answer, that there was a "clear understanding" that the complainants were to look to Archibald Rowland for the title; but where is the proof of this fact? Remember it is admitted Garman sold the complainants the land, and that they bought of him, and this "clear understanding" is alleged by way of, and is strictly matter of avoidance. Where, I respectfully ask, is the competent proof of this allegation? There is none. Surely a contract by parol, would not bind us. One who is bound to convey land, cannot resist the demand for title; nor can he insist on the consideration, when he cannot convey, by alleging a parol contract, that the purchaser had agreed by parol, to look to another for the title, and certainly he could much less prove such a written contract by parol evidence. The case of Oldham vs. Woods, 3 Monroe, 48, where specific performance or a recision was the question, the court decided that an incumbrance of the land could not be proved without producing the deed of mortgage; but here the defendant does not

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Petition for a re-hearing.

even allege, that either he or the complainants held any written obligation on Archibald Rowland, for a conveyance. And if he had, the existence of the paper is not proved. The objection then, is to both the validity and competency of the proof offered to establish the alleged agreement, that we were to look to Archibald Rowland to fulfil the agreement we had made for the land. It does therefore seem to me the case was for the complainants on the merits; and it is important for them, that the present opinion shall not stand, because when they bring us their new bill, they will be met by it; and certainly barred, if the circuit judge regards it as authority, as he certainly would do. If I am right in supposing no valid contract is proved, that the complainants were to look to Archibald Rowland for the title, he certainly was not a necessary party.

Monroe, for defendants in error.

The petition for a re-hearing, overruled.

Hord vs. Bodley.

MOTION FOR RESTITUTION

Case 25.

Appeal from the Mason Circuit; W. P. ROPER, Judge.

Ejectment. Occupant law. Commissioners. Habere facias possessionem. Restitution.

February 8.

When occupant, after having commissioners appointed, fails for nine months, to cause them to act; the court will set aside the order appointing them, and grant to the successful claimant a writ of possession.

Judge ROBERTSON delivered the opinion of the Court.

BODLEY having failed, for nine months, to have improvements, &c. valued, under an order made for his benefit, and at his instance, appointing commissioners in an ejectment, in which Hord had recovered judgment against him, the court on Hords Motion, after serving a rule on Bodley to shew cause, set aside the order for commissioners, and ordered a *habere facias* to issue in favor of Hord. Bodley appealed from this decision, but the appeal being afterwards dismissed, because the record was not filed in time, Hord presented a certificate of that fact, and therefore, having obtained another order for a *habere facias* was put into possession on the 16th of November, 1825. On the 28th of November, 1825, Bodley obtained a supersedeas, and thereupon moved the court to quash

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BRUCE vs. BURDET, &c.

the *habere facias*, and restore him the possession. The court sustained his motion, and ordered restitution. From this decision Hord appealed. And the only question for our decision, is, whether the last opinion of the court below was erroneous or not.

Quære. Whether supersedeas obtained after writ of possession executed, authorizes restitution?

Whether in such a case, after a judgment at law has been regularly carried into complete effect, by proper process, a supersedeas from this court can, by relation, affect what had been done, need not be decided now.

There having been no error in the proceedings, by which Hord was put in possession, awarding the writ of restitution was wrong.

The decision of the inferior court setting aside the order for commissioners, has been affirmed by this court. Hord we presume, is yet in possession, and the only consequence of a decision in this case will be the costs.

Whether the supersedeas could operate on the *habere facias* after its execution, or not, (and we are inclined to the opinion that it could not) unless connected with peculiar circumstances; still as the circuit court had committed no error in awarding the writ, as Bodley alone had been in default, and as in consequence of that default, Hord had been legally put into possession, the order of restitution was improper.

Judgment reversed.

Triplett, for appellant: *Haggin*, for appellee.

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CHANCERY.

Bruce vs. Burdet, &c.

Case 26.

Error to the Jefferson Circuit: HENRY PIRTLE, Judge.

Bill in equity for an account. Action at law. Jurisdiction. Acceptance. Set off. Estoppel.

February 3.

Judge ROBERTSON delivered the opinion of the Court.

Statement of facts, orders of Hunt, & Hunt and M'Intosh, in favor of Burdet, upon Bruce.

HUNT in his own right, and Hunt and McIntosh, as partners in trade in Boston, had consigned to G. W. Bruce a commission merchant at Louisville, a large quantity of merchandize for sale on commission. When part had been sold, and an unsettled account current existed between the parties, on the 19th of June 1822, being indebted to Samuel Burdet, Hunt

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drew an order in his own name, and Hunt and McIntosh drew jointly, an order in favor of Burdet on Bruce, requesting him to account with Burdet for the goods sold, and those remaining to be sold, and to pay him the balance due, and which should become due for the sales. BRUCE vs. BURDET. &c.

On the 6th of July, 1822, the orders being presented, Bruce accepted them, and agreed in writing, in relation to each as follows: "I agree to account with "the said Samuel Burdet, and to pay to him or "order, any balance which may eventually be due on "settling my concerns and accounts, with the said "McIntosh and Hunt." Bruce's written acceptance and agreement, to account with Burdet.

Shortly afterwards, the accounts on Bruce's books were transferred to Burdet, and kept in his name. Bruce failing in 1823, on the application of Burdet, through his authorized agent, to render an account or pay over to him any balance which was due, Burdet, in October, 1823, brought his bill in chancery, setting out the foregoing facts, charging Bruce with being largely in his debt, and praying for an account, and a decree for whatever might be ascertained to be due. Bruce and Hunt, and McIntosh were made defendants. The accounts in Bruce's books transferred to Burdet. Bruce fails to account, and Burdet files his bill.

In March, 1823, Bruce brought an action of trespass on the case against Hunt and McIntosh, alleging that they had failed to supply him with as many goods as they had promised to consign to him, whereby he had sustained great damage; and the case having been transferred to the federal court, a judgment was rendered against Hunt alone in Bruce's favor by default, for $2,000 damages in November, 1823. Bruce's judgment at law against Hunt.

In his answer, Bruce, among other things, insists on a set off of this Judgment against Hunt, and admits the sale of all the goods, and a balance thereon in his hands unaccounted for. Answer insists upon a set off.

The circuit court decreed in favor of Burdet, the amount acknowledged by Bruce to be in his hands. To reverse which the case is brought in this court. Decree of the circuit court.

Although various errors are assigned, yet it becomes necessary that we shall decide only two of them. Errors assigned, examined.

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BRUCE vs. BURDET, &c.

These are, 1st. Whether the court had jurisdiction, and whether the suit was properly brought? 2d. Whether Bruce was entitled to his set off?

Bill in chancery, for an account; the proper and most adequate remedy. The common law action obsolete.

The suit was properly brought in the name of Burdet, because the written agreement of Bruce, vested in him the sole right to the balance on settlement. And the suit was well conceived. A common law suit for an account, may be maintained; but this remedy is almost abolished by disuetude. The chancellor by modern practice, takes almost exclusive cognizance of such cases; and he is certainly more competent to a full and just settlement of unsettled accounts current, than the common law judge can be. There is no doubt he had jurisdiction in this case.

No error to unite two acceptances in the same bill, both being by the same person, and for the benefit of the person.

Nor can we see any objection to the joinder of these two acceptances, in the same bill; they were both for the benefit of the complainant, and were in consideration of the sales of goods by Bruce, and were both between the same, and no other parties. And therefore, to prevent a multiplicity of suits, it was not only allowable, but peculiarly proper to unite the whole in the same bill.

We concur with the inferior court in its refusal to allow the set off.

Bruce's agreement to account with Burdet, precludes all claim to set off any demand he might have against Hunt, or M'Intosh and Hunt.

The agreements of Bruce to account to Burdet, taken in connexion with the orders drawn on him, in favor of Burdet, can be fairly interpreted to mean only, that he would account to Burdet for the goods sold, and virtually for all that should be sold, and pay him whatever balance might be due for their sale.

The words "concerns" & "accounts" are mercantile and technical. Their application.

The words "concerns" and "accounts" are mercantile terms, and have an appropriate technical import. The subject matter, in this case, in reference to which they are used, was the merchandize on consignment, and they mean in this instance, nothing more nor less, than the ordinary incidents to a sale of consigned goods. They should not be perverted so as to include any other right or interest, or duty, than such as are incidental to the sale on commission of the goods, in relation to which, the orders were drawn and accepted.

They cannot comprehend any other contract, or any other claim or liability existing or consequential, cer-

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tain or contingent, between Bruce, and the consignors, unknown to Burdet, and not referred to, in the orders. The acceptances correspond with the orders, and when connected with them, as they should be, leave little or no room for doubt about the effect, and intent of Bruces engagements to Burdet. That Bruce himself gave the same construction to his engagements, as that given by this court, is evinced by the transferrence of the current account to Burdet.

The effect and extent of Bruce's engagements.

The claim of Bruce, on which his judgment was obtained against Hunt, was of an extraordinary character. It was unliquidated, at the date of his written promises to account to Burdet. Suit had not been brought on it. Judgment was not obtained until more than a month after Burdet's bill was filed. By assuming to pay to Burdet, the net balance which should be due for the sale of the goods, if we have not misconstrued the effect and extent of his contracts, he is estopped from setting off against Burdet any equity which he might have had, however clear and well ascertained, against Hunt and McIntosh. The authorities on this point are very numerous; but the following only need be cited: Litts. Se'ct. Ca. 471; Har. 427; ib. 432; Printed Decisions, 375; ib. 224–5; 1 Washg'n. 299, 389.

Character of the judgment against Hunt, attempted to be set off.

But it is material to notice, in addition to this view of the subject, that Bruce, in his answer, states, that he owed nothing for goods sold at the time he made his assumptions to Burdet; that the balance unaccounted for when the bill was filed, was for goods sold after his contracts with Burdet, and that his claim to damages against Hunt and McIntosh, was for their failure in the fall of 1822, and Winter 1823, to furnish him with goods to sell according to their contract, made on the day of 1822; the latter fact is shewn by the declaration exhibited. When these facts are presented, all semblance of any equitable right to set off vanishes.

If the consignee of goods to be sold on commission, undertake to account for the proceeds, and pay any balance to a third person, in a suit between such person and consignee, the consignee can set up no equity, between himself and consignor, arising after assumpsit.

Burdet was certainly not responsible for any delinquency on the part of Hunt and McIntosh, which might take place after Bruce's written promises to account to him for the sale of the goods on hand. Especially

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FISHBACK &c vs. WOODFORD.

as it does not appear that the contract alleged to have been violated by Hunt & co. was made before the acceptances to Burdet. And if Hunt and McIntosh became responsible, it was after all their right to the proceeds of sales had been transferred for a valuable consideration to another. *The orders were drawn for an account for sales of goods which had been consigned, before the 19th of June, 1822, and they are so accepted. The judgment is for the failure to consign goods in the full of 1822, and winter of 1823.*

The bill and answer are alone sufficient to maintain the decree on the two points noticed; and consequently, the other subordinate points, need not be touched; for admitting that as to them, the court erred, still those errors cannot affect the decree.

Decree.

Decree affirmed with costs and damages.

Denny and *Mayes*, for plaintiff; *Crittenden*, for defendant.

CHANCERY.

Fishback, &c. vs. Woodford.

Case 27.

Error to the Clarke Circuit; GEORGE SHANNON, Judge.

Parol evidence. Written instrument. Fraud. Mistake. Depreciated bank paper. Sale at auction. Currency. Dollars.

February 4.

Judge ROBERTSON delivered the opinion of the Court.

Statement of the case.

THE appellants, as administrators of Jacob Fishback, deceased, sold at auction, the personal estate of the decedent, in October, 1821, and among others who purchased at the sale, the appellee bought property to the amount of $101 12 1-2, and executed his note with security, at twelve months credit, for one hundred and one *dollars* twelve and a half cents.

Complainant's bill charges sale by adm'r of intestate's estate, to have been for com'th's bank paper; but note "inadvertantly" executed for dollars.

Judgment being obtained on this note, against the appellee, he filed his bill in chancery for an injunction and final relief; charging, that the sale was for commonwealth's paper, or the common currency of the state; that this was the general understanding of the purchasers and others, at the sale, was announced as one of the terms by the crier, and frequently repeated during the sale, by the administrators; that the pro-

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perty which he purchased at the sale, was high, even in bank paper, which was the only medium then in general circulation, and that the note was "inadvertantly" drawn for dollars.

Def's answer denies the sale to have been for paper, or that the note was inadvertantly executed.

The answer admits, that the administrators received paper of some other purchasers, on the day of sale, and of others, when their notes became due, at the rate of exchange at the time of sale; but denies that the sale was for paper, or that there was any mistake, or inadvertance in the drawing or execution of the note.

Examination of the depositions in support of the bill.

Many depositions were taken, exhibiting some contrariety of facts and opinions: but there is a decisive preponderance in numbers, as well as in the intrinsic probabilities attested, in favor of the allegation, that it was the general understanding, that the property was selling for current paper. Many witnesses swear, that the crier stated publicly during the sales, that they were for the common currency, but that gold or silver would not be refused. Others, on the same side, swear, that the administrators said, during the sale, that it was not for specie, but for the common currency. This, however, is not proved to have been published generally.

Testimony in support of the answer.

For the administrators, sundry persons, who were at the sale, swear, that they heard no suggestion from any person, that the sale was for paper; that they heard the administrators reply to inquiries made on that subject, by individuals, that they could not make any agreement, which could compel them to receive depreciated paper; but that they would receive whatever would pay debts, and satisfy the distributees.

These are the prominent facts exhibited in the testimony; other subordinate circumstances are proved, which have some influence on the principal facts; but it is useless to extend this opinion by recapitulating them.

No irreconcileable discrepancy in the deposi. tions.

There is no discrepancy in the various opposing depositions, which cannot be reconciled. The facts proved by the administrators, are chiefly negative, and do not essentially conflict with the affirmative facts established by the appellee. An analysis of the facts

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contained in each deposition, would clearly shew, that there is nothing irreconcilable in the testimony. We are well convinced, that the appellee, and a large majority of the persons at the sale, understood that it was for current paper; and we have as little doubt, that this understanding was authorized by the crier and administrators. We believe, too, that the administrators stated to many, who individually applied to them, that they could not be bound to receive paper unconditionally. And from all the circumstances, we are bound to believe, that the administrators were willing, that the impression should be made on the croud, that the sale was for paper, to enhance the amount of sales; and perhaps connived at suggestions by the crier and others, which had a delusive effect; intending, if possible, to have it in their power, either to receive the paper, or to coerce specie on a replevin of two years: and we believe, that this was the understanding of some of the witnesses.

The views of the administrators.

Decree of the circuit court.

The circuit court perpetuated the injunction for one half of the amount of the note, which was the ratio of depreciation, when the note became due.

This decree seems to accord with the abstract justice of the case. But general principles of equity and fixed rules of law, being indispensable to the wholesome administration of justice, if the decree cannot be sustained, without relaxing or violating some of them, it must be reversed; and if this shall be the case here, we shall only see another illustration of the maxim, every where and every day exemplified, that the general good is secured, at the expense of individual hardship.

Parol evidence competent to prove fraud or mistake, in the execution of any written instrument.

We have never doubted, that parol evidence is competent to prove fraud or mistake, in the execution of any written contract. We are only surprised, that for years past, it should have been deemed necessary by court or lawyer, to employ argument, or cite authorities, to prove a doctrine so well and so long established. The case of Inskoe vs. Proctor, contains nothing new. Its principles had been so well understood, that in the previous case of Baugh vs. Ramsey, the court seem to consider them too plain, to need the support of

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reasons or cases. We know of no case in modern jurisprudence, in which any enlightened chancellor has refused relief against a writing, in the execution of which, fraud or mistake had been established. But, must not the fraud or mistake be alleged, and clearly proved? Public policy and private security require, that on appropriate allegations to let in parol proof, that proof should be very strong and clearly convincing.

The allegations of the bill insufficient.

There is no allegation in this bill, of fraud in the procurement of the note: nor is any mistake in its execution, distinctly averred. We are willing, however, to allow, that by the expression "inadvertantly drawn," mistake is intended, and may be understood. But the mistake or the fraud, must be in the execution of the note. It is not proved, that the language or import of the note, was not well understood; or that either was different from what was intended by the parties, when it was written and signed. Proving the consideration, as is satisfactorily done in this case, might conduce very forcibly to confirm slight circumstances, tending only remotely, to the establishment of fraud or mistake, and which circumstances, without some subsidiary fact, would be clearly insufficient. But evidence of a paper consideration, however clear and conclusive, does not *per se* prove a mistake or a fraud, in the *execution* of the note given on that consideration, for dollars or money. There must be some substantive fact established, independent of the consideration, before the chancellor can set aside or modify the legal import or effect of a solemn written contract. If an obligor understands the language and effect of a note when he signs it, and executes it willingly, and without being seduced by the fraud of the obligee, he ought not to be, he never is, permitted to dispute or deny its obligation, according to its rational and legal construction. In such a case, there is no fraud, and certainly no mistake; and parol evidence cannot resist, alter or control the writing, which is the highest evidence of the contract.

The fraud or mistake must be in the execution of the instrument, for parol proof, to contradict the terms of it, or vary its stipulations.

Proof of paper consideration, of a note for dollars, does not *per se*, prove a mistake or fraud.

For parol evidence to alter or modify the terms of a written instrument; it is necessary to establish some fact independent of the consideration, establishing fraud or mistake.

In this case, the subscribing witness has not proved, that the note was not drawn as it was directed to be drawn; or that it was not understood as drawn; or

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that there was any expectation when it was signed, that the word dollars, without the adjunct "in specie" or "commonwealth paper," would mean paper. There is no proof whatever, of any mistake, in the execution of the note, except what is furnished by evidence of the consideration. It is not proved, that the word "dollars," at the date of the note, was understood by the people generally, or by the contracting parties, to mean paper or specie dollars, indifferently; so as to shew, by proving this equivocal popular import of the word, when used in contracts at a particular period, and in a particular place, that it did not necessarily mean, when inserted in a note, specie dollars; and that, therefore, proving by parol evidence clearly, that the consideration was paper, might not contradict or detract from the note. Nor has it been proved, that at the date of the note, when contracts were made for specie, they were literally so expressed: nor, indeed, has any circumstance in aid of the relief sought, been attempted to be proved, except that the sale was for paper. To what extent other proof might operate, we cannot judicially pre-determine; it is enough, that it is wanting in this case.

No proof in this case of a mistake or fraud, except what is derived from the terms of the sale, and the consideration of the note, which are not deemed sufficient to exonerate the obligor, from the legal effect of his written stipulation, to pay "dollars."

Cases like this, are seldom, if ever, skilfully prepared; and are generally lost for want of proper preparation. It would not often happen, that specie could be coerced on a note founded on a paper consideration, if all the facts which might be averred and proved, were properly presented. But we must decide on cases, as they appear on the record before us; and in doing so, we must adhere to general and fundamental principles, on the inflexible application of which, depend the rights of the people. We must decide the law, as we understand it; and by applying this test to the case before us, we are constrained to reverse the decree of the inferior court, and remand the case for a final decree, dissolving the injunction, and dismissing the bill.

Decree reversed, and cause remanded.

Hanson, for plaintiff; *Depew* and *Barry*, for defendant.

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PETITION FOR A RE-HEARING.

Messrs. BARRY *and* DEPEW, *presented a petition for a re-hearing.*

Petition for a re-hearing.

THIS court seem to predicate their opinion in this case, upon the ground, that the allegations of the bill are not sufficient to open the door for the admission of the parol proof exhibited by Woodford.

The bill states, that the plaintiffs in error, as the administrators of Jacob Fishback, deceased, sold at auction, the personal estate of the decedent, in October, 1821; that the defendant in error purchased property at the sale, to the amount of $101 12½, for which he executed his note with security, at a credit of twelve months; that before he bid for the property, he understood from one of the administrators, and the public declarations of the crier, that the property was to be sold for commonwealth's bank paper; in consequence of which, he bid the highest paper prices for the property he bought; that at the time of the sale commonwealth paper was at a depreciation of 50 per cent, and 100 when the note became due; that his note was executed "*inadvertently*" for *dollars*, without specifying that it was for commonwealth's paper; that Jesse Fishback, one of the administrators, knew that he understood the sale to be for bank paper, and if such were not the terms of the sale, he wrongfully permitted him to labor under the mistake; that the administrators had recovered judgment at law for $101 12½, the amount of the notes, and were threatning to coerce from him the amount thereof in silver.

The administrators, in their answer, admit, that the note was given for the property which defendant purchased at their sale; that they had obtained judgment at law for the amount of the note, and wished to coerce payment in silver; that commonwealth's paper was at the depreciation alleged; but they deny, that the sale was for commonwealth's paper, or that the crier or either of the administrators, made such representations to the defendant. They allege that the property sold for a fair price in silver; that they took the note for *dollars*, by which *they meant* dollars of the current coin of the United States, and that the note was

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drawn and executed, according to the contract of sale, and the intention of the parties.

Petition for a re-hearing.

The bill and answer, substantially present to the consideration of the chancellor, the question whether the plaintiffs in error had or had not, through fraud or mistake, obtained from the defendant in error, a note materially different from the contract between the parties, or a note for double the amount he was to pay by his agreement. This is all that is required, according to the opinions of the most enlightened chancellors of England, or this country.

In Simpson vs. Vaughn, 2 Atkins, 32, the bill charges, "that the bond, which was intended to be a *joint* and *several* one, was filled up by Baker, one of the obligors; that, omitting "severally bound," was done by him *fraudulently*, or through *ignorance* and *mistake*," and that it should be decreed a joint and several bond, according to the intention of the parties. Lord Hardwicke heard parol proof and granted relief.

Joynes vs. Statham, 3 Atkins, 388, was a bill for the specific execution of a lease. The defendant insisted in his answer, that it ought to have been inserted in the agreement, that the tenant should pay the rent clear of taxes; that the plaintiff, having written the agreement himself, had *omitted* to insert that provision, and offered parol proof, to shew that this was part of the agreement. Lord Hardwicke received the evidence, and refused a decree for specific execution.

In South Sea company vs. D'Oliff, cited in Pitcairn vs. Ogbourne, 2 Ves. Sen. 377, Sir John Strange says: "The company, by agreement, was not bound to answer for any irregularity by supercargoes, unless information was given in *two* months after return home. The instrument was not drawn up until on board the ship, and in a great hurry, and executed there by the party, who, when he got out to sea and read it over, found it was *six* months instead of *two*, and brought his bill to be relieved against the *variation* in the instrument. Lord King admitted parol proof, on the ground, that it would be a fraud in the party, to avail himself of the variance between the agreement and the writing, declaring that parol proof must be admitted, to shew the variation between the writing and the

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Petition for a re-hearing.

true agreement; "otherwise, if it could be got into black and white, there would be no relief."

In Washburn vs. Merrills, 1 Day's Rep. 139, the bill states, that the complainant, being indebted to the defendant in the sum of £162 15*s*., executed his note therefor, to him; and also, a deed for fifty acres of land, as collateral security; that this deed was intended as a mortgage, but through *mistake* and *accident*, was drawn and executed as an absolute deed; that the mistake was not discovered until some time after the deed was delivered, and prayed that the complainant might be allowed to redeem, upon payment of the debt and interest. Parol proof was admitted, to shew that it was a mortgage, as intended by the parties, and a decree permitting redemption upon paying the £162 15s., with interest.

In the case of Gillespie vs. Moon, 2 Johnson's Chancery Cases, 586, which was a bill brought to correct a mistake in a deed of 250 acres of land, to obtain a reconveyance and possession of fifty acres, and an account for the rents and profits thereof, the only allegation of fraud or mistake, is stated by Chancellor Kent, in the following language: "That the description and bounds in the deed to the defendant, were copied literally from the description in the former deed, except as to the number of acres, and through *mistake* or *fraud*, was made to comprise within the bounds, the whole 250 acres conveyed to Mrs. *Mann*, and including the fifty acres leased to *Cable*, and which were not intended to be included." Most of the material allegations of the bill were denied in answer. Parol evidence was offered, to shew the *variance* between the *deed* and the *agreement* of the parties, under the head of *mistake*. Its admission was zealously opposed by counsel, who cited many authorities in support of the position they assumed. But Chancellor Kent, after an able review of all the cases in the English Chancery, admitted the parol proof, and granted the relief.

In Gartin and wife vs. Chandler, 2 Bibb, 240, the bill alleged, that the drawer of the note made a mistake in the manner of writing it. By virtue of this allegation, as to the *mistake*, the court of appeals *admitted* the parol proof; but refused relief, because the

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evidence was not sufficient to overcome the denial in the answer.

Petition for a re-hearing.

In the case of Inskoe vs. Proctor, decided at the fall term, 1827, the bill charges, that the contract was for the sale of a tract of land at $600, to be paid in paper of the bank of the commonwealth, then depreciated to about two dollars in paper for one in silver; that William B. Lerty was called upon to draw the writings, and, by *mistake* or *accident*, or not knowing that it was necessary to insert in the notes, that they were payable in paper of the bank of the commonwealth, he drew them for *dollars*, omitting to say what kind of money. This is the only allegation in the bill, as to mistake, at the execution of the writings. The answer denies most of the material allegations in the bill. The court of appeals admitted the parol proof, and granted relief.

None of the many eminent chancellors, who have had this subject under consideration, have refused parol evidence, because the allegations in the bill were insufficient. The questions, which they have so ably and learnedly discussed, are, whether the parol proof could be admitted to contradict the answer, and was sufficient to satisfy the mind of the chancellor, as to the existence of the mistake, or rather, *variance*, by *mistake* or *accident*, between the *writing* and the true agreement of the parties. They seem to have been satisfied with the allegations of the bill, in all cases where the *variance* has been alleged to have taken place, through mistake and accident, or through fraud or mistake.

In the case of the King against Horne, which was a writ of error in the House of Lords, to a judgment of the court of King's Bench, upon an information for a libel, Lord Chief Justice De Gray, delivered to the House of Lords, the unanimous opinion of the twelve Judges, in the following language: "The charge must contain such a description of the crime, that the defendant may know what crime it is, which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'guilty' or 'not guilty,' upon the premises delivered; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes." "Whatever

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circumstances are necessary to constitute the crime imputed, must be set out; and all beyond are surplusage." His Lordship further said: "The true rule to go by, is laid down by my Lord King, in the case of Rex vs. Mathews, which is this: 'That the court and jury must understand the record, as the rest of mankind do.'"

Let the record in this case, be tested by these principles, and we feel confident, that this court will say, it contains enough to justify the decree of the court below. The record clearly shews, that the plaintiff in error, obtained from the defendant, a note for double the amount he had agreed to give for the property, by taking his note for dollars, instead of bank paper dollars; and that the note was procured in this form, by the fraud of the plaintiffs, and the "inadvertence" or *mistake* of the defendant. Take the bill and answer together, and no other construction can be put upon the record, by chancellors, lawyers, or "the rest of mankind." Justice and policy, equally forbid the establishment of a rule, which will confine the parties, in their allegations and proofs, to the time and place of executing the writings. The temple of chancery should have its doors wide open, for the admission of proof, to shew fraud or mistake. It is not material, whether the witnesses were in the room where the writings were executed, or in an adjoining room, or in the streets, or the open fields. If they heard the agreement, or the admissions of either party, as to the terms of the agreement, their evidence should be received. The only enquiry should be, whether by accident, mistake or fraud, there is a substantial variance, between the writing and the agreement of the parties.

But if the parties are to be confined to the time and place of the execution of the writings, they will be denied relief in ninety-nine cases out of one hundred. It will be vain and useless for them to proceed, under the direction of learned and experienced counsel. Their proof cannot correspond with the allegations of their bill. They confided in the person with whom they contracted. He reduced the contract to writing; they read and signed it, without the interchange of a word, as to the terms of the agreement.

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MORGAN vs. FROTH AND NEEDLES.

Petition for a re-hearing.

Such a doctrine would roll back the whole current of authorities in the English and American chancery, from the time of Lord Hardwicke until the present period. But if we should be mistaken in their view of the case, it is believed that the mandate of the court is incorrect. This court should have sent the case back to the court below, for proper parties, &c. and upon failure of the defendant in error, to comply with the rule of the court below, on that subject, that his bill should be dismissed without prejudice. See 3 Bibb, 111, 284; 4 Bibb, 26, 187, 239, 267-8, 257-8, 543-4; 1 Marshall, 556; 2 Marshall, 501-2; 5 Littell, 18, 19, 34, 42, 48 and 135.

A re-hearing of the cause is, therefore, respectfully asked by the counsel, for the defendant in error.

Petition for a re-hearing overruled.

DEBT.

Case 28.

Morgan vs. Froth and Needles.

Error to the general court; JOHN L. BRIDGES, Judge.

General court. Jurisdiction. Statute. Interest.

February 4.

Judge ROBERTSON, delivered the opinion of the Court.

Since the act of 1825, the general court has no jurisdiction for a less sum than $500.

AN action of debt was brought in this case, in the general court, on a note executed in Philadelphia, for $110 56. The writ issued in November, 1825, and judgment by default, was rendered by the court, for the principal and six per cent interest, from the time the note was payable.

There is manifest error in this judgment.

It is error to give judgment for interest upon a note, executed in another state, unless the rate of interest is proved.

Since the passage of the act of assembly of January, 1825, regulating the jurisdiction of the general court, that court could not take cognizance of this suit. And if it could, it erred in giving judgment for interest without proof, ascertaining the rate of interest in Pennsylvania, because, the *lex loci* contractees must govern, when no other place than that where the contract is made, is designated for its execution.

Judgment, therefore, reversed with costs.

Mayes, for plaintiff; *Combs*, for defendant.

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Hay vs. Arberry.

TRESPASS.

Error to the Estill circuit; GEORGE SHANNON, Judge. Case 29.

Trespass. Local action. Jurisdiction. Demurrer. Judgment in bar.

Judge ROBERTSON delivered the opinion of the Court. February 5.

THIS was a local action, brought in Estill. The defendant plead by attorney, to the jurisdiction, alleging that the supposed trespass was committed in Perry county; a demurrer to this plea being overruled, the court gave judgment in bar of the action. It is error to render judgment in bar, upon overruling demurrer to plea to the jurisdiction.

The judgment ought not to have been in bar, and the court ought to have offered leave to reply to the plea.

It is, therefore, considered by the court, that the judgment of the circuit court be *reversed*, and the cause remanded for new proceedings. Mandate.

Turner, for plaintiff; *J. Speedsmith*, for defendant.

West vs. Patrick's Administrator.

DEBT.

Error to the Madison circuit; GEORGE SHANNON, Judge. Case 30.

Judgment. Damages. Interest.

Judge ROBERTSON delivered the opinion of the Court. February 5.

West brought an action of debt on a judgment he had obtained against the intestate, for damages, and by the default of the administrator, recovered judgment by the decision of the court, for the amount of his original judgment and costs. He prosecutes this writ of error, to reverse his second judgment, because the court did not give him interest. We see no error in the judgment, as the first judgment was for damages, which did not carry interest; a jury might have given or refused interest, in their discretion. 4 Bibb, 541. Consequently, for exercising that discretion, the judgment of the court ought not to be reversed. Not error for judgment to be rendered upon former judgment for damages, without allowing interest.

Judgment affirmed.

Turner, for plaintiff.

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COVENANT.

Case 31.

Kirtley vs. Kirtley.

Error to the Barren Circuit; BENJAMIN MONROE, Judge.

Bond. Evidence. Affidavit. Measure of damages. New trial.

February 7.

Judge ROBERTSON, delivered the opinion of the Court.

Statement of the case. Verdict for $500, and judgment.

ON the issue of "covenants performed;" the defendant in error, who was plaintiff below, recovered a verdict for $500, against the administrator of the covenantor on a bond given in 1812, for the conveyance of 110 acres of land.

No consideration is stated in the bond; but its penalty is $600.

Motion for a new trial overruled.

After judgment on the verdict, the defendant moved for a new trial; because, 1st. The verdict, was for an amount, greater than the evidence justified. 2d. He had discovered, after the jury was sworn, by scrutinizing the face of the bond, that it had been altered by the substitution of $600 for $300 in the penal part, which was unknown to him before the jury was sworn, not having had any personal knowledge of the bond, nor having seen it until a few moments, before it was too late to file an additional plea, or ask for a continuance.

In support of this 2d ground, the defendant filed his affidavit. But the court overruled the motion, and this writ of error is prosecuted to reverse the judgment.

Evidence in support of the verdict.

The only evidence in addition to the bond, were the statements of two witnesses; one swore, that the price given for the land was $200 in property, and that the value of the land at the time of the sale did not exceed $2 an acre. The other supposed that the land was worth $2, 50 cts; but on cross examination acknowledged that he was not more than fifteen years old at the date of the contract, and had no recollection of any sales of land in the neighborhood.

The criterion of damages.

Whether the value of the land when sold, or the price given for it with interest, be assumed as the criterion of damages, this verdict is not sustained by the testimony. The modern doctrine seems to be, that the value of the land is the proper test; but that the

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best evidence of that value, is the price given. The price given in this case according to a reasonable construction of the testimony, could not have been more than $200 in money. Nor had the jury a right rationally to infer from the evidence, that the value of the land exceeded $220.

In cases *ex contractu*, when a new trial should be granted.

The proof of the value, and of the consideration, nearly correspond and fortify the conclusion, that the jury ought not to have assumed as the basis of their verdict more than $220, at the greatest extent. And in a case *ex contractu*, when the evidence preponderates so decisively against the verdict, as it does in this case, a new trial would be proper. Indeed there is *no* evidence to sustain the amount of the verdict.

When def't discovers an alteration on the face of the instrument tendered, at a period so late that he can neither plead an additional plea, nor move a continuance, it is good cause for a new trial.

The 2d ground also, was sufficient to authorize a new trial. The administrator does not state in his affidavit, that he can prove an alteration in the bond, by witnesses; this in ordinary cases would be required, but in this, it ought not to be; he could not be expected to know whether he could prove any thing by witnesses or not, as he made the discovery of the alteration only on the trial; and moreover, he may be able to establish the deed by inspection. Indeed he swears this; and states, that on a new trial, he would in his opinion, be able to sustain the plea of *non est factum*.

Under all the peculiar circumstances of the case, the affidavit discloses good ground for a new trial.

Judgment reversed, and the case remanded for a new trial. Judgment & mandate.

Mayes, for plaintiff; *Monroe*, for defendant.

Sumrall vs. Ryan.

CHANCERY.

Error to the Mason circuit; WILLIAM P. ROPER, Judge. Case 32.

Practice in chancery.

Judge UNDERWOOD delivered the opinion of the Court. February 6.

JAMES RYAN made a contract with Sumrall, in 1819, by which it was agreed, that Sumrall should advance a large sum to Ryan, to enable him to Statement of facts, and adjustment of

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SUMRALL vs. RYAN.

the accounts between plaintiff and defendant.

purchase produce for the New Orleans market, and Ryan, on his part, agreed to pay Sumrall in New Orleans, the money so advanced, and as much more. The additional sum was to be repaid by Sumrall, at an after period. In pursuance of this contract Sumrall advanced about $3000, and James Ryan, in his own, and in the name of his brother Moses, under the style of James and Moses Ryan, drew bills on New Orleans, dated in February, 1820, for $6150; one of the bills amounting to $1150 was paid by the Ryans, at maturity, the remainder were returned, protested for non payment, and Sumrall having passed them off by endorsement in Philadelphia, as he states, was compelled to take them up by paying principal, interest, costs and damages, which damages amount to 10 per cent, as paid by Sumrall. On the 30th of May, 1820, Sumrall and the Ryans settled, and they paid him $2181 in cash, and gave their note for $380 81 1-4, "in full for the payment of drafts, and all other contracts to that date," as expressed in Sumrall's receipt; on this note Sumrall received judgment against Moses Ryan, and he enjoined the judgment; the court perpetuated the injunction, and Sumrall has appealed to this court. The equity mainly relied on in the bill, is, that since the note was executed, the Ryans transferred to Sumrall, ten shares of bank stock, in the bank of Limestone, at the price of $400, for which Sumrall gave his receipt, dated 30th March, 1821, stating that the stock had been received at that sum, on account of dealings between said Ryan and himself. Sumrall attempts to evade the effect of this receipt, by stating in substance, that he did not want the bank stock, that it was under par, and that he would not take it at par, until Ryan agreed to re-settle with him, in relation to the bills, and indemnify him for the losses he had sustained, on account of that transaction, which being agreed to by Ryan, they entered on the settlement, when $332 25 was allowed Sumrall, being a balance on account of the stock of $67 75, to go as a credit in the note. There is no proof, whatever, of the statement made by Sumrall, and therefore, we rely on the receipt, as shewing a payment made after the note was given, of $400. Sumrall sets out an extract from his books, shewing that the settlement in relation to the

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stock, took place 9th February, 1821. The receipt is dated 30th March, 1821, and the credit of $67 75 is not entered on the note till 6th April, 1821. These things shew that it is safest to rely on the receipt, allowing interest on the note from the time it became due, up to the payment of the bank stock, on the 30th March, 1821, and it will make principal and interest amount to $394 13, to which we deem it proper to make an addition of $34 61, upon the following ground: The sum of $2181, paid on the 30th May, 1820, was made up by $1281, in notes on the bank of the United States, in part, and notes on the bank of Kentucky, for the residue, to-wit: $900; but as these latter notes were under par, 12 1-2 per cent. was allowed, to make them equal to par funds, and an agreement made, that if that allowance was not sufficient, the deficiency should be made up thereafter. It is satisfactorily shewn, that 4 1-2 per cent. in addition to the 12 1-2 under the agreement, should be made in notes, on the bank of Kentucky, and these being reduced to their value, in specie, at the rates of 117 to 100, gives the above sum of $34 61. This added to the amount of the note and interest, and a total is made of $428 74, from which deduct the amount of the receipt, and there will remain $28 74, with interest thereon, from the 30th March, 1821, to which Sumrall is entitled. On the merits, therefore, the court ought not to have perpetuated the injunction for this sum, and the costs of the suit at law; but the sheriff's commission on the amount, exceeding the said sum of $28 74, with interest thereon, up to the date of the replevin bond, and the costs of the suit at law, added thereto, should have been perpetually enjoined.

If amended bill be filed uniting a new complainant, it is erroneous to try the cause at the same term, unless the trial appear to be at the instance of the defendant.

The bill in this case was filed by Moses Ryan, alone, and after the cause stood for trial, between him and Sumrall, and had been continued many terms subsequent to the filing of the answer of Sumrall; and on the very day the cause was finally tried, an amendatory bill was filed, with leave of the court, making James Ryan a party complainant, and calling on the defendant, Sumrall, to make a further exhibit of his accounts, alleging it was important that he should do so. The order of court, giving leave to file the amen-

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KINCAID vs. KINCAID.

datory bill, states, "that the complainant is not to be entitled to a continuance, in consequence thereof." There is nothing to shew that this part of the order was made, at the instance of the defendant, nor does it appear that the defendant consented to proceed with the trial, after the court gave leave to file the amendment. For aught that appears, the trial may have been entirely *ex parte*. It was certainly erroneous to let a new party in the cause, at so late a period upon an amendment to the bill, containing important matter, without giving the defendant an opportunity to respond to it; and as the record in this instance, does not shew that he had waived that right; and as the decree is in favor of the party, so let in, who recovers his costs, we deem it erroneous for that cause.

Decree and mandate.

Wherefore, it is decreed by this court, that the decree of the court below be reversed and set aside; and that the defendant, Sumrall, have leave to file his answer to the amendatory bill, if he makes application to do so, and in case of his refusal, that then a decree be entered in conformity to this opinion.

The plaintiff must recover his costs in this court.

Haggin, for plaintiff; *Crittenden*, for defendant.

Kincaid vs. Kincaid.

Case 33.

Error to the Bath Circuit; SILAS W. ROBBINS, Judge.

Notice. Depositions. Surprise. New trial.

February 6.

Judge ROBERTSON delivered the opinion of the Court.

Notice to take depositions insufficient.

A notice, executed on the 4th of December, to take a deposition, on the 14th of the same month, at a place 290 miles distant, from the residence of the person notified, is not a reasonable notice.

To reject without notice, depositions which had been read without objection on a former trial, is such sur-

The bill of sale was sufficiently proved, to be suffered to be read to the jury. The judge, in effect, did no more than decide, that it was "sufficiently proved" *to go to the jury*. Therefore, there is no error in the opinion, on these points. But the court erred in not granting a new trial. To reject for another reason, without notice of objection, depositions which had

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been read on a former trial of the same suit, without objection, (as the affidavit discloses to have been the fact in this case) is such a surprise as to entitle the party surprised, to a new trial.

WASHINGTON vs. GRIFFITH.

prise as justifies a new trial.

Judgment reversed, and cause remanded.

Haggin, for plaintiff; *Triplett*, for defendant.

Washington vs. Griffith.

CHANCERY.

Error to the Shelby Circuit; HENRY DAVIDGE, Judge.

Case 34.

Allegations. Bill. Surprise. New trial.

Judge ROBERTSON, delivered the opinion of the Court.

February 7.

ALTHOUGH the allegations of the bill in this case, are not as distinct and specific as will be generally required in a bill for a new trial; yet as there is enough stated, to render it probable, that the complainant was lulled by the negotiation for compromise, and might have made defence at law, if he had not supposed that the defendant would not prosecute his action without notice to him, and that he did not know of the trial in time to apply to the common law judge for a new trial; we think that the defendant ought to have answered the bill. Its allegations are sufficient to let in proof which would justify a decree in favor of the complainant.

When the allegations of a bill for a new trial are such as, if proved, would justify a decree for complainant, the defendant should be compelled to answer.

It is therefore ordered and decreed, that the decree of the circuit court be *reversed*, and the cause remanded for new proceedings.

Mayes, for plaintiff; *Denny*, for defendant.

THE ATTORNEY GENERAL, *as counsel for the defendant presented a petition for a re-hearing.*

The counsel for the defendant, would respectfully ask the court to reconsider the opinion given.

A demurrer must be founded upon this, "that taking the charges in the bill to be true, it is an absolute, certain, clear proposition, that the bill would be dismissed with costs at the hearing: and though the court has an idea, that if the cause goes on, there may be

Petition for a re-hearing.

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WASHINGTON vs. GRIFFITH.

Petition for a re-hearing.

some ground for a decree; yet, it seems, it is bound to say, whether upon the *facts, as stated in the bill*, if proved or confessed at the hearing, a decree would be made." 2 Maddocks, 225, Mitford, Pl. 86.

In the opinion rendered, this court say "although the allegations of the bill in this case, are not as distinct and specific as will be generally required in a bill for a new trial; yet, as there is enough stated to render it probable, that the complainant was lulled by the negotiation for compromise, and might have made defence at law, if he had not supposed that the defendant would not prosecute his action without notice to him, and that he did not know of the trial in time to apply to a common law judge for a new trial; we think that the defendant ought to have answered the bill; its allegations are sufficient to let in proof, which would justify a decree in favor of the complainant." It would seem from the authorities before cited, that the question in this case for the court, was, if the allegations of the bill were true, was the complainant entitled to relief? and not the question decided by the court, which was, is it probable, that the complainant may adduce proof which would entitle him to a new trial?

It is understood to be a rule, that the allegation and proof must agree; and if the proof goes beyond the allegation, it is, in so far, to be disregarded by the court; a party cannot recover at law upon testimony, clearly demonstrating his right, unless he has stated his cause of action in his declaration, as broad as his proof; neither can a complainant in chancery entitle himself to relief upon a case fully made out in proof, if the case made out in the bill would not authorize it. The pleading in a suit is the channel through which the evidence is to flow.

In this case the court has distinctly conceded that the case presented in the bill, would not authorize a decree in favor of the complainant; but has reversed the decision of the circuit court, not because that court erred in supposing the bill insufficient, but because "its allegations are sufficient to let in proof which would justify a decree in favor of the complainant."

The decree then hereafter to be made in favor of complainant, is to be based upon proof which he

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Petition for a re-hearing.

may possibly adduce, not in support of the allegation of his bill, but a new and distinct case. The decision of this court upon the demurrer, when properly understood, is, that the bill itself does not shew a case entitling the complainant to relief, but it shows enough "to let in proof" which may present a case upon which the complainant ought to be relieved.

It is thought to be entirely unnecessary to refer to the bill, for the purpose of shewing that it does not make out a case, entitling the complainant to a new trial at law; this seems not to be controverted by the court. I will however, remark, that it does not pretend to allege that the complainant could prove in another trial, any thing which would defeat a recovery by the defendant, or reduce the amount below the former verdict; it barely suggests that the recovery was unjust.

The ground presented, would not have entitled the complainant to a new trial, had the application been made in due season to the court of law. The cases decided by this court, (are so numerous) to show this fact, that a particular citation is thought unnecessary.

The court overruled the petition for a re-hearing.

REPLEVIN.

Case 35.

Baker vs. Harper.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Replevin. Distress for rent. Restitution. Bond. Security. Statutes. Detinue. Trover.

February 7.

Judge ROBERTSON delivered the opinion of the Court.

Whether the action of replevin maintainable in this case, not decided, as no objection made.

WHETHER an action of replevin, is maintainable in any other description of cases, than those of distresses for rent, has not been *directly* decided by the appellate court of this state, so far as we are informed. But, as the court has adjudicated on replevins for property, not taken by distress, without having expressly settled this point; a tacit recognition of the right to prosecute an action of replevin, in other cases than distress, may be inferred. We do not, therefore, feel disposed in this case, to review, and ascertain the doctrine on this subject, as no objection is made to the right to maintain the action.

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BAKER vs. HARPER.

Nor are we now inclined, for the same reason, to decide whether a replevin in the "detinet" is maintainable. This suit was designed to be in the "detenuit." It was brought for a horse, and bond was executed for the purpose of replevying the horse, and obtaining restitution; and if the horse had been delivered, the plaintiff, on succeeding, would have only obtained judgment for damages, for his detention; as in the "detenuit." This may, therefore, be considered a suit in the "detenuit."

The nature, of this action and the extent of the remedy.

Return of the sheriff. Def'ts plea. Motion to dismiss for insufficiency of the security in plaintiff's bond.

Suit dismissed.

The sheriff returned on the writ, that he had summoned Harper, but could not find the horse; consequently, the horse was not replevied to the plaintiff, as was the chief object of the suit, and as the writ directed. But, on the calling of the cause, Harper having plead "*non cepit*," moved the court to dismiss the suit, for want of sufficient security on the bond. It was admitted, that the security had left the state. But Baker refused to give other security, insisting, that as he had not obtained, and could not get the horse, the bond was not necessary. The court dismissed the suit; and the only question presented to this court, is, whether this decision was correct.

We think that it was not.

Bond only necessary when there is restitution of the property.

In the replevin in the "detinet," pledges were not required in England, for the obvious reason that the defendant or avowant, retained the possession of the thing sued for. Bond was necessary, only when the thing was restored to the plaintiff by the officer, and was intended as an eventual indemnity to the other party, if he should succeed in the action.

The statutes of Virginia and Kentucky, do not apply. Character of the bond.

In action of replevin in the 'detinet,' if there be not restitution of

The bond in this case cannot be statutory, because the statute of Kentucky, and that of Virginia, of 1769, the only acts recollected, on the subject of actions of replevin, apply exclusively to replevins of property, distrained for rent in arrear, and require a bond on the restitution of the property distrained. As, therefore, this case is not embraced by either of these statutes, and as there seems to have been no occasion for bond and security, when it was ascertained, that the horse could not be replevied, the bond was "*functus officio*." The bond in such a suit as this, is literally a replevin

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bond. It ought not to be effectual, until the property is replevied, and is not obligatory until restitution. It is not necessary at all in such a case.

Without surrendering the horse, Harper had no right to demand a bond; and cannot be injured, by the insufficiency of the security.

the property, the bond given by plaintiff, is inoperative; the insufficiency of the security, therefore, no cause for dismissing the suit. The suit "is virtually an action of detinue or trover.

The horse not having been restored, this suit is virtually an action of detinue or trover, and Harper has no more right to bond and security, than he would have in either of these latter cases.

The court, therefore, erred in dismissing the suit; and the judgment reversed for that cause, and the case remanded for further prosecution.

Turner, for plaintiff.

Williams vs. Williams.

Error to the Livingston county court.

Dower. County court. Jurisdiction.

Judge UNDERWOOD, delivered the opinion of the Court.

February 7.

THE Livingston county court, on the application of the defendant in error, appointed commissioners to assign her dower in the estate of James W. Williams, deceased, whose lawful wife, said defendant assumed to be. The court made the appointment, the commissioners reported, and the court confirmed the report; thereby, setting apart a portion of the land and slaves of the decedent for the dower of the defendant in error. These proceedings were opposed by the plaintiffs in error, as heirs of the decedent at every step. They proved that the defendant had been married to Roberts, before she married the decedent, that Roberts was alive at the date of the second marriage, and that no such thing as a divorce between them, had taken place, to the knowledge of the witnesses. The defendant in error, endeavored to rebut this proof by giving in evidence a rumour, that Roberts had been lawfully married to a woman, who was alive at the time he married the defendant in error, and that this woman and Roberts

Statement of the case.

The admission of evidence of a second marriage erroneous.

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SHARP vs. WHITE.

had never been divorced. The plaintiff in error objected to the evidence, in relation to the existence of the rumour, but the court overruled the objections. Evidence of a rumour, such as was here given, was clearly improper; but the whole case, as presented on the record, exhibits one, of which the county court should not have entertained jurisdiction. The case of Bintch vs. Cunningham, 4 Bibb, 462, contains an exposition of the act of assembly, of 1803, under which the county court, in this instance, proceeded. The principles settled by that case, confine the county courts to the *assignment* merely, of the right of dower, where the right is conceded, and deny to the county courts, the power of adjudicating upon the existence of the right, when that is controverted. Here the right of dower was the point in issue, and this, the county court had no authority to decide.

The county court has no jurisdiction to determine a contested right of dower.

Can only assign dower when the right is conceded.

It is, therefore, considered by the court, that the order made at the July term, 1827, of the Livingston county court, approving and admitting to record, the allotment made by the commissioners appointed at the April term of said court, preceding, be reversed, annulled, set aside and held for nought, and that the plaintiffs in error, recover of the defendant, their costs.

Order of the county court reversed.

Mayes, for plaintiff; *Crittenden*, for defendant.

1jm 106
f121 133

COVENANT.

Sharp vs. White.

Case 37.

Error to the Anderson Circuit; THOMAS M. HICKEY, Judge.

Covenant. Independant. Pleas, Consideration. Failure. Demurrer.

February 9.

Judge ROBERTSON delivered the opinion of the Court.

To an action of covenant by White, on a written promise to deliver whiskey, the plaintiff in error filed three pleas, demurrers to all of which being sustained by the court, a verdict and judgment were rendered for damages.

Covenant on promise to deliver whiskey. The pleas. Demurrers, & sustained.

The first and second pleas, are filed, as pleas impeaching the consideration; but are both clearly insufficient.

Two first pleas insufficient.

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The first alleges, in substance, that the covenant was given in consideration of the sale by White, to Sharp, of a sixty-five gallon still, then in White's furnace, and which White agreed to deliver to Sharp, on request; but that sometime afterwards, being requested, he failed, and refused to deliver the still, and *therefore*, the consideration of the covenant had failed.

The covenants independant; and either party can maintain an action without performance.

This plea shows on its face, that the conclusion drawn from the facts stated, is a *non sequetur*. The covenant for the whiskey, and the promise to deliver the still, are obviously independent, and either party for a breach, may maintain an action, without a performance of his undertaking. The consideration of the covenant, is not the *delivery* of the still, (the failure in which, is the subject of complaint;) but the *promise* to deliver it, whenever requested. The promise is still in full force, and its breach gives a perfect cause of action. The consideration is therefore still valid and subsisting; and the plea is bad: 1 Bibb, 454; 4 Bibb, 342, 386, 493; and Young vs. Triplett, 5 Littell, 247.

The second plea is liable, not only to the same objection, but another; it does not even state a contract to deliver the still.

The third plea good.

It is sufficient to allege generally, that a covenant was procured by fraud of covenantee.

But the third plea, is substantially good, although it is not drawn with precision, or technical propriety. It is intended to be, and may be understood to be, a plea alleging that the covenant was procured by the fraud of White. This being its import, it is issuable, and if true, is a bar to the action. It would have been better to specify the fraud in the plea; and it is more usual to do so; but it is not necessary. A general plea of fraud, in most cases is good; 1 Chitty, 553.

Judgment reversed and cause remanded.

Triplett, for plaintiff.

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The Commonwealth vs. B. S. Chambers.

Case 38.

Proceedings against a clerk, with a view to remove him from office, for breach of good behaviour. Upon a trial on the merits, the clerk was removed.

February 9.

Judge UNDERWOOD delivered the opinion of the Court.

Statement of the case.

THIS is a proceeding instituted against Chambers, clerk of the Scott circuit court, under the 10th section, of the 4th article of the constitution, to remove him from office, for breach of good behaviour. The process which issued against him, contains the charges and sets out the breaches of official duty, for which this court is called on to remove him. For the purpose of presenting the nature and form of the process, which has been sustained by this court, in this case, and also to exhibit the charges on which the prosecution is based, we have thought proper to copy the process at length. It is as follows:

J. J. Marshall 1jm 108 f129 219

J. J. Marshall 1jm 108 138 153

Summons and charges.

"The Commonwealth of Kentucky, to the Sergeant of the Court of Appeals, greeting: we command you to summon Benjamin S. Chambers, clerk of the Scott circuit court, to appear before the judges of our court of appeals, at the capitol, in Frankfort, in the county of Franklin, on the 26th of November next, to answer to the following charges, exhibited against him, by the attorney general, for, and on behalf of the commonwealth, and to shew cause, if any he can, why he should not be removed from his office, as clerk aforesaid, for the following breaches of good behaviour in office, to-wit:—"The said Chambers did, on or about the day of January, 1821, as clerk of the Scott circuit court, make out, and certify officially, an order of the following purport, to-wit: "Kentucky, Scott circuit, to wit: September term, 1820. Ordered to be certified to the auditor of public accounts, that the sum of thirty dollars be continued the allowance, for the support of Hans Peeples, a person of unsound mind, for three months, ending the 10th December, 1820, and that Aaron Holland, be continued a committee to receive and appropriate the same to his use and benefit; "a copy attest, B. S. Chambers, c. s. c. c.," which order, certified officially, as aforesaid, as the order of the Scott circuit court, at its September term, 1820,

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the said Chambers, presented to the auditor of public accounts, about the day of with an endorsement as follows:—"Pay to B. S. Chambers," Aaron Holland $30, and the said Chambers, then, and there demanded, and received from said auditor, a warrant upon the treasury of this commonwealth, for said $30; which warrant, said Chambers, on said day, presented to the treasurer, and received the amount thereof, to wit; $30.

"Whereas, in truth and in fact, there was no such order made by the Scott circuit court, at their September term, 1820, (a copy of which, the said order presented as aforesaid, to the auditor, and upon which the aforesaid warrant was granted) purported to be, nor was there any record in the office of said Chambers, clerk of said Scott circuit court, of any allowance of $30, or any other sum, at said September term, 1820, to said Peeples, or for his benefit; or in trust to said Holland, or any other person for him, and that said Chambers, at the time he certified the said paper, herein before recited, and at the time when he presented the same to the auditor as aforesaid, and received the warrant, and at the time he received the said $30 from the treasury, well knew that no such record existed in the Scott circuit court.

"2d. At the June term, 1821, of said Scott circuit court, the said court directed, and there was entered upon the records of said court, an order of the purport following:

"Ordered to be certified, to the auditor of public accounts, that the sum of sixty dollars, be allowed for the support, and maintenance of Hans Peeples, a lunatic, for six months, commencing on the 10th day of March, 1821, and ending on the 10th day of September, 1821; and that John N. Lyle, be continued a committee to receive, and appropriate the allowance aforesaid to his support; and it is further ordered, that the sum of thirty dollars, be allowed for the purposes aforesaid, commencing on the 10th of September, 1820, and ending on the 10th of December, 1820, being omitted in a former order, through mistake.

"And afterwards to wit: the day of when said Chambers, clerk as aforesaid, was applied

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to by said Lyle, for a copy of the order last recited, to be presented to the auditor, for a warrant upon the treasury, for the allowance therein specified, he the said Chambers, clerk as aforesaid, made out, certified, and delivered, as a copy of said order, a paper of the following purport:

"*Scott Circuit, Sct.* *June term*, 1821.

"Ordered to be certified to the auditor of public accounts, that the sum of sixty dollars, be allowed for the support and maintenance of Hans Peeples, a lunatic, for six months, commencing on the 10th day of March, 1821, and ending on the 10th day of September, 1821, and that John N. Lyle, be continued a committee to receive, and appropriate the allowance aforesaid, to his support.

"A copy attest, B. S. CHAMBERS, c. s. c. c."

"The said Chambers, then and there, well knowing that the paper last recited, was not a full and complete or correct copy from the records of said court; but omitting wilfully and designedly, to copy and certify the latter part of said order of court, thereby the more effectually, to conceal the facts set forth in the first specification.

"3d. An action of ejectment in the name of Alexander McClelland as lessor of the plaintiff against said B. S. Chambers, &c. had been instituted in said Scott circuit court, and prosecuted to judgment, and a judgment was rendered in favor of the lessor of the plaintiff, and on the day of a *ha. fa.* was issued from the clerk's office of said court, and put into the hands of John N. Lyle, a deputy sheriff of said county of Scott, to be executed, who in pursuance of the command of said writ, executed the same, and delivered possession of the lands to the plaintiffs lessor, or his agent, and returned said process to the clerk's office of said court, the said Chambers, then being clerk thereof, with his official return thereon endorsed, shewing the manner in which he had executed the same; that the said Chambers, clerk as aforesaid, instead of recording the said return, of said deputy sheriff, truly, and as it was made, in the book kept for that purpose, falsely and fraudulently recorded

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in said book, in the room of said return of said deputy sheriff, on said process, in substance as follows:

"Returned without being executed, by agreement.

"Attest, B. S. CHAMBERS, clerk."

And fraudulently suppressed, said *ha. fa.* returned as aforesaid; by means of which false and fraudulent conduct on the part of said Chambers, clerk as aforesaid, he was enabled to succeed, (and hold said land) in a subsequent controversy in court, in respect to it.

"4th. The said Chambers, with intent to hold the land alluded to, in the third specification, and to defraud the plaintiff, in said *ha. fa.* the more effectually to consummate his object, suppressed the *ha. fa.* mentioned in said third specification, and made out another *ha. fa.* of like import; but without a return, endorsed thereon by the sheriff, and substituted it in the room of the other.

"And this, he shall, in no wise omit, and have then there this writ. Witness, Jacob Swigert, clerk of our said court, at the capitol aforesaid, this 27th day of October, 1828, and in the 37th year of the commonwealth.

J. SWIGERT, C. C. A."

The proof in support of the charges, consists of record evidence, and parol testimony.

Evidence.

It is clearly proved, that Chambers presented at the auditors office, on the 5th of January, 1821, a paper purporting to be a copy of an order, of the Scott circuit court, made at the September term, 1820, continuing the allowance of $30 for the support of Hans Peeples, (a copy of which, is truly set out, in the first charge) that he received a warrant on the treasury, for the amount, and receipted for it, on the back of the paper, so presented. There is an endorsement on the paper presented at the auditors office, in these words: "Pay to B. S. Chambers, Aaron Holland." The allowance on the face of the order, appearing to have been made to said Holland, as committee for the lunatic, the object of the endorsement, seems to have been, to authorize Chambers to draw the money. It was proved, that the words "*pay to B. S Chambers,*"

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were in the hand writing of Chambers; but who wrote the signature of Aaron Holland, was not established. Holland himself was introduced as a witness. He stated that the thumb of his right hand had received an injury, which had prevented him from writing with great uniformity, and said, the signature might, or might not be his, and did not say whether it was or was not. A report made to the Scott circuit court, at their March term, 1821, was presented, signed by said Holland, which stated in substance, that the allowance of $30, for three months, ending on the 10th of December, 1820, for the support of Hans Peeples, had been expended for his maintenance. The signature to this report, Holland recognized as his. The body of the report was proved to have been written in the hand writing of Chambers. Although Holland signed the report, he stated, that he had *never received or expended a cent* of the money allowed for the support of Peeples, as set out in the report. It was proved by Rhodes Thompson, who had been committee for Peeples, and who had declined to act in that capacity again, that at the request of the court, he had called on Holland, to ascertain whether he would act, that Holland declined acting, and that he so informed the court on the next day. Thompson could not state positively, at what term of the court he gave the information as to the refusal of Holland to act; but thought it was in the fall. If his impressions were correct, it must have been at the September term. The order book of the September term, 1820, of the Scott circuit court, does not shew that there was any allowance for the support of Peeples. It is entirely silent on the subject. If the evidence stoped here, in what light would the conduct of Chambers be presented? Surely in a most unfavorable aspect. The conclusion would be inevitable, that he had as clerk, without the semblance of authority, made out a paper purporting to be a copy of the record, allowing $30, for the support of Peeples, when no such record existed; that he had induced Holland, or one man, in his name, to endorse the paper, so as to authorize him to draw the money; that he had *received the money*, and had *not paid over a cent of it* to the committee. Holland, who was entrusted with its disbursement for the luna-

Holland's report to court.

R. Thompson's evidence.

The order book.

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tic's benefit; and that he had drawn up a report to the court, which Holland signed, stating that the money had been properly applied, when he, Holland, knew nothing about its appropriation, at least, when he never expended a cent of it, for the lunatic's use, none of it having come to his hands. Such a state of facts, would present such a palpable breach of good behaviour in office, that this court would not hesitate to remove him. But it is attempted to shew, that the foregoing, is not the true state of the case, and for that purpose, the minute book of the Scott circuit court has been given in evidence. There appears in the minute book of the proceedings of the Scott circuit court, at the September term, 1820, the following entry, made under the date of September 11th, 1820, at the bottom of the page, "*allowance to Hans Peeples continued; same committee continued.*" And it is contended that this minute, through some omission of the clerk, not criminal, was not carried on the order book, in making up the record, as it should have been done. At the June term, 1820, of the Scott circuit court, Aaron Holland, was appointed committee for Hans Peeples, to disburse an allowance, made for his support, as the record proves. The allowance at the June term, was $30, for three months from the 10th of June, to the 10th of September, following. And it is urged, that the minute above, having reference to the order made at the June term, did, with sufficient certainty, make an allowance of $30, for the support of Peeples for three months, up to the 10th of December, 1820, and continued Holland as committee, to receive and appropriate it; and that in consequence thereof, Chambers, the clerk, was justified in making out the certificate, purporting to be a copy of the record, upon which the auditor issued his warrant for the money. But if he was not strictly justified, it is contended, that the existence of the minute, shews that Chambers could not wilfully, and knowingly, have erred in the transaction. It would have given the court pleasure to have regarded the conduct of the clerk, in the favorable point of view presented by his able counsel, predicating his conduct, upon the existence of the minute. But there is other testimony in this cause which forbids it. Before we notice this testimony, we will

The entry in the minute book.

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make a few remarks relative to the nature of the minute book. We regard it as a book, used by the clerk, in which, to make *memoranda* of the proceedings of the court, while the court is progressing with business. The business transacted by the court, is stated in the minute book, in short notes, and these are written out on the order book, or record proper, at full length, as the clerk has time. When so written out, and signed by the judge, they constitute the proper records of the court, and until signed by the judge, they cannot with propriety be considered the record. We know, that the judges, of the circuit courts, sometimes by signing the minutes, give, or attempt to give, the minute book, the force of a record; but this is a practice, which we think, ought not to be tolerated. The minutes are, generally, too imperfect, to shew clearly and fully, what the court has decided and done. The practice of permitting the clerk after the adjournment of the court, to write out the minutes at full length, and to insert many things which cannot appear from the minutes, does *pro tanto* constitute him in fact a judicial officer in vacation. Such practices should be discountenanced. But in this case, it does not appear, that the minute relied on, was ever signed by the judge. It derives therefore, no efficacy as a record, upon the ground of its having received the approving signature of the judge. The question then presents itself, could Chambers, have so mistaken the effect of that minute, as to have regarded it as the record, for the purpose of making out the paper, on which he drew the money? The money was drawn in January, as already stated. Was the paper, purporting to be the copy of the record made a day or two before it was presented to the auditor, or when was it done? In commenting on this matter, the attorney general spoke of it as having been made in January, when Mr. Chambers corrected him, by suggesting, that it was made at the time the minute was entered, or shortly afterwards. Take it either way, and it is a circumstance, which operates unfavorably to the accused. The minute is under date of the 11th September, 1820, which was on the Monday of the second week of the term of the court. If the paper on which the money was drawn, was made out after the adjournment of

The nature of the minute book.

The minutes are no record until transcribed, in *extenso*, upon the order book and signed by the judge.

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the court, it was the clerk's duty, to search the order book for the authority to make it. Had he done so, no authority for it would have been found. If he made it out during the term, or on the day, the minute was entered, it was wrong; because the court had power over the record, during the term, and nothing which had been done, should have been certified as official, without leave of the court, until after the adjournment. Besides, as the money could not have been properly drawn until the end of three months, when it might appear, owing to the continued lunacy, and life of Hans Peeples, that it was proper to draw it; the motive cannot be perceived, for making the paper, and retaining it three months, especially as it is in proof, that the committee refused to act, and never got a dollar of the money. The testimony of Lyle fortifies these considerations, and rivets the conviction, that Chambers, has violated his duty, in making out, presenting and drawing money on a paper, purporting to be a copy of the record, when no such record existed. Although Lyle, did not pretend to give the language used by Chambers, in the conversations had with him; yet he stated some things, as the result of those conversations, in which he could not well be mistaken, unless he designed to commit perjury. He spoke from his best recollection, and although his memory when tested on another subject, was shewn not to have been infallible, still we cannot disregard what he said, unless his credibility had been impeached. Lyle was appointed committee for Hans Peeples, at the March term, 1821, of the Scott circuit court; after his appointment, the wife of Peeples complained to him, that there was more money in arrear, coming to them, than had been appropriated by Lyle. The order appointing Lyle, only allowed $30 for three months, commencing on the 10th December, 1820, and ending on the 10th of March, 1821; thus making no allowance, for the period, from the 10th of September, to the 10th of December. Lyle spoke to Chambers, on the subject, who in substance told Lyle, as he deposed, that he, Chambers, had been in Frankfort, and wanted some money, and had drawn some for Lyle, and that he, Chambers, thought he would take that liberty with Lyle. Lyle remarked, that there was no order of

Lyle's evidence.

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court for it, Chambers said, if there was not, he could arrange that matter, at the next court. Lyle exhibited a receipt from Peeples' wife, dated 17th May, 1821, acknowledging the payment of ten dollars, "balance in full, for maintaining Hans Peeples, six months, commencing on the 10th September, 1820, and ending the 10th March, 1821." He said, that he believed, that Chambers had paid him the money; although, he did not recollect the place, where, or time, when, it was paid him. This testimony of Lyle's, so far as it relates to arranging the matter, at the next court, by supplying the want of an order, is corroborated by the record. For at the June term, 1821, there was added to the order, allowing $60 for Peeples' maintenance for six months, from the 10th of March, to the 10th of September, 1821, these words, "and be it further ordered, that the sum of $30, be allowed for the purposes aforesaid, commencing on the 10th of September, 1820, and ending on the 10th of December, 1820, being omitted in a former order through mistake."

Foot of the order of June, 1821.

This testimony of Lyles, cannot be reconciled with the idea, that Chambers drew the money innocently, upon the paper endorsed to him by Holland; for he would not have acknowledged, that he had drawn the money for Lyle, being in want of cash, and believing he could take that liberty, if he had drawn the money in good faith, for Holland. It was urged in argument, that Lyle must have been mistaken on this point, because he was not entitled to the money, his appointment and authority to receive, not extending further back than the 10th of December, 1820. We think it more consistent with the general tenor of the evidence, to believe that Chambers was conscious that he had drawn the money without proper authority, and without the knowledge of Holland, than to presume a mistake in Lyle's statement, and we are not without strong grounds for this opinion. If Chambers drew the money for Holland, why not pay it over to him? Would Holland have endorsed, so that Chambers might get the money, if he intended not to receive it and expend it for the use of the lunatic? If Chambers, after getting the money, did not pay it to Holland, who says he never got it, to whom did he pay it, if

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it were not paid to Lyle? The conclusion to our minds is irresistable, that the money was paid to Lyle. Holland and Lyle were the only persons that stood in a situation, which would justify the reception of it; one says he never got it, the other says he believes he did. His receipt shows it. This conclusion cannot be evaded, unless it be by supposing that Chambers himself expended the money, for the use of Peeples, thus taking upon himself, a troublesome trust without authority; a supposition which it would be rash to indulge in, when there is not a particle of evidence on which to predicate it, and when it was so easily proved, if true. It is more natural to believe the testimony, that Chambers, being in Frankfort and wanting money, thought he could take the liberty of getting it, and having got it, when called on by Lyle, made the statements detailed by him, as a palliation for having done so, not having appropriated the money, or disclosed the fact that he had received it. There is another part of the evidence, which strengthens the conviction, that the money was improperly drawn by Chambers. Its tendency is strong to confirm the belief, that the signature of Holland, on the paper presented to the auditor, is not genuine. We allude to the application of Chambers to Rhodes Thompson, to write the name of Holland on a piece of paper. The object of this was to ascertain whether the name of Holland had not been written on the paper presented to the auditor, by Thompson, who had once been concerned as committee for Peeples. This could only have been done upon the idea, that Holland's signature was not put on the paper by himself, but by another, and that it was desirable to find out who that person was. This took place after this prosecution was agitated. Besides the dissimilarity in the character of the letters, in the signature of Holland, admitted to be genuine, and those in his name, upon the paper presented at the auditors office, cannot be readily accounted for, by an injury or hurt of the thumb. The foregoing views of the evidence are not weakened by the testimony of Suggett, who recollects that the court were in the habit of making allowances for the support of Peeples, at every term, without being able to detail the particular times when allowances were

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or were not made; nor by the testimony of Penny and others, who were intimate with Peeples and his family, and heard no complaint, that the money allowed for the three months, between the 10th of September and the 10th of December, 1820, had not been applied to the use of Peeples. The whole can well stand together.

We have not deemed it important to say any thing, on the subject of the leaves being torn out of the minute book, nor do we consider it essential to consider the point, whether the minute made under date of the 11th September, 1820, was not transferred to the order book through mistake, or whether it was intentionally omitted, because Rhodes Thompson informed the court, that Holland would not act as committee, or whether it has been put in the minute book since this prosecution commenced. There is one circumstance, however, growing out of the testimony of Ford, which we will mention. When he examined the minute book, to ascertain what entries had been made therein, relative to Hans Peeples, he states, that although he did not find the minute under date of September 11th, 1820, he found an entry dated March, 1821, making an allowance for six months, which, when transferred to the order book, was reduced to three months; and he then told the prosecutor that he ought to be satisfied. We have examined this entry in the minute book. The time is designated by a figure, and whether it was intended for a 3 or 6, or whether it has been altered from a 3 to a 6, it is difficult to decide. Be that as it may, it was the minute on which the order was made, first appointing Lyle committee at the March term, 1821, of the Scott circuit court, making an allowance of $30 for the support of Peeples, for three months, from the 10th of December, 1820, to the 10th of March, 1821. The minute as it stands, forces on us these remarks. If the figure was originally a 6, why was the order formed on that minute for three months only? We cannot tell, unless it was to conceal the fact, that the money for three months of the time, had been drawn in the preceding January, by Chambers. If it was originally a 3, and has been since altered, it evidences a fraudulent design. That minute which seem-

Ford's evidence.

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ed to satisfy Mr. Ford's mind, that all was right, has not had the same effect on the mind of the court.

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The evidence in support of the second charge, exists on the record, as stated in the charge, that is, the order of the June term, 1821, is put on record as copied, and the proof is conclusive, that the clerk, Chambers, in making out a copy for Lyle to draw the money, omitted to copy that part of the order allowing $30, for time commencing on the 10th of September, 1820, and ending on the 10th of December, 1820. No reason can be assigned for this omission, but the fact, that Chambers had, himself, previously drawn the money allowed for the support of Peeples, during that time.

Evidence in support of the second charge

The third charge is not sustained by the evidence. The accused has satisfactorily exculpated himself from those suspicions of impropriety, which might have rested on him, had the testimony adduced in support of the charge remained unexplained; and we regret that he has not been equally fortunate in respect to the two first. And even in regard to them, we hope his conduct has not been the result of any settled depravity of heart, although we cannot resist the conviction, that it has amounted to a breach of good behaviour in office. Under such a conviction, it is our painful duty, to pronounce the sentance of the law. It is severe, but yet it is salutary. The records in the offices of our clerks, contain the evidences of all our titles, either in the form of deeds, wills or administration and distribution of intestates estates. In them the rights of all are registered, as generation succeeds to generation. In our circuit courts, the life, liberty, reputation, contracts and property of the citizen are often brought in question, and the adjudications of the courts, are recorded by their clerks. And we wish it to be known by that valuable class of our officers, whose functions are almost, if not exclusively ministerial, that they violate their duty whenever they do any act in making, suppressing or altering the record, unless it be sanctioned by the court, or provided for by law. It is through the medium of clerks, that the people have access to the treasury, for many purposes. Commonwealth's witnesses, *venire* men, &c. &c. are

Third charge not supported by the evidence.

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paid on their certificates. It is important for the welfare of the state, that clerks should be strictly correct upon all occasions. And they will find it a matter of infinite importance to themselves, if they visit the treasury and draw the money upon claims, passing through their own hands, unless such claims are fully sanctioned by their courts or by the law.

If the act *per se*, be a breach of good behaviour, (as it may be) the motive will not be investigated.

In adjudicating upon the conduct of clerks, this court cannot enter into a consideration of the motives which influence their conduct. The simple enquiry under the constitution, is, has a breach of good behaviour in office, been established by the proof? If it has been, whether it proceeded from ignorance, good intentions or bad, the consequences are the same, (in their nature, although they may not be in degree) to the community. A clerk may do an act from the best motive, and yet, he might place himself in such an attitude by it, as imperiously to require his removal. Suppose a clerk, in drawing up his record, were to enter judgment against an executor *de bonis propriis*, instead of *de bonis testatoris;* or suppose he were to leave out interest on a note, or to give it from an improper date, and after the adjournment of court, suppose him to set about correcting these blunders of his, by altering the record. If one clerk may do these things, all may; and thus, in effect, a power would be be conceded to them, in vacation, of revising and correcting the acts of the court, under the pretence of innocently rectifying their own errors. We give to record evidence, absolute verity. This principle, which has been settled for ages, ought to be overturned as soon as the doctrine shall prevail, that clerks may alter and change their records, in vacation, according to their opinions of propriety. A greater strictness, if possible, should be observed, and a more rigid rule applied in judging of the conduct of clerks, where they undertake to certify what the record is. Here they have it in their power to do great mischief, by imposing on those who receive their certificates as containing absolute truth. In this case, by certifying as the record, what was not, it became necessary to suppress, afterwards, the real record, and thus a false certificate was substituted in place of the truth.

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The lapse of time, since the acts were done by Chambers, that constitute the foundation of the prosecution, has been relied on in his behalf. We know of no limitation to investigations of this character. The delay in bringing forward the charges, may be a ground of imputation, against those who have been instrumental, at so late a period, in setting on foot the prosecution. It may be said, that private malice, and not the public welfare, is at the bottom of it. With these things, the court have nothing to do, further than to make the age of the transactions so operate, as to induce us to receive the parol proof in relation to them, with great caution.

In conclusion, we shall state, that good behaviour in a clerk, consists in discharging accurately and faithfully, and in proper time, all the duties required of him by law, in making correct records of the judicial acts and proceedings of his court, under the superintendance of the court, so that the whole record, when signed, shall have received the approbation of the court, and then, in preserving the records so made, inviolate and unchanged, subject alone to such amendments as may be made by the court, and in certifying that which the law requires him to certify, and that which the record warrants him to certify, and nothing more nor less. Believing that the accused has fallen short, in the discharge of his duty, according to this rule, and has been guilty of a breach of good behaviour in office, it is our duty to pass sentence.

Wherefore, it is considered and adjudged, that Benjamin S. Chambers, clerk of the Scott circuit court, is guilty of a breach of good behaviour in office, in manner and form as set forth in the first and second charges exhibited against him. And it is further considered, ordered and adjudged, that the said Benjamin S. Chambers, clerk of the Scott circuit court, aforesaid, shall be, and he is hereby removed from his said office of clerk of the Scott circuit court aforesaid. The members of this court concurring in this sentence.

Denny, attorney general, for the commonwealth; *Crittenden* and *Richardson*, for the accused.

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The defendant, by his counsel, applied for a new trial, on the following affidavit and petition.

COMMONWEALTH OF KENTUCKY:

Franklin County, sct.

BENJAMIN S. CHAMBERS, this day, personally appeared before me, Henry Wingate, a justice of the peace, for the county aforesaid, and made oath, that since his trial upon the late prosecution against him, in the court of appeals, he has acquired information of testimony, that would have been material and important to his defence, and, as he hopes, decisive in his favor. He states, that he believes the fact to be, that when Rhodes Thompson, whose testimony is referred to, and will be recollected by the court, learned from Holland his unwillingness to serve as committee for the lunatic, Hans Peeples, that he informed the court to that effect; but, at the same time, desired that Holland might stand or be appointed committee, saying that he (Thompson,) would do the business for him; that he can prove the truth of this statement, by E. P. Suggett. He can also prove, as he verily believes, by William Suggett, Andrew Johnson, and many others, that the signature of Holland's name, on the copy of the order of allowance to H. Peeples, produced from the auditor's office, is in the hand writing of the said Rhodes Thompson.

The affiant also states, that he does verily believe, he can prove, by Gen. John Payne, the repeated declarations of the said Thompson, that he (Thompson,) knew that the $30, (the money drawn from the treasury, by virtue of the aforesaid copy of said order,) was paid to Mrs. Peeples, the lunatic's wife, at the proper time.

He further states, that he can prove, that John N. Lyle, who was a witness upon the trial of said prosecution, after his examination, and after the evidence on both sides was closed, when complaining of the severity of the remarks of counsel, on his testimony, said, that the counsel was severe upon him; but that he had been mild in his testimony, and that if he had it to go over again, he could, or would, tell a great deal more. That he can prove this statement, in relation to Lyle, by Edward Johnson, and many others.

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He further states, that he has discovered the whole of the above mentioned evidence, since the close of the evidence upon said trial; nor even then, nor until since the opinion of the court, upon said prosecution was rendered, was he apprised of the materiality of said newly discovered testimony.

B. S. CHAMBERS.

Subscribed, and sworn to, before me, this 6th of February, 1829. H. WINGATE, J. P.

Motion and Petition for a new trial and re-hearing.

Petition for a re-hearing.

THE very frequent refusal of petitions for re-hearing in this court, heretofore, would have induced the counsel for the defendant, to have been diffident in this application, did they not consider the present case an exception to the common rules of proceeding. The reason of the rule of court, which authorizes petitions for re-hearing, is founded on the supposition, that cases may occur, in which it may be necessary to the ends of justice. We do conscientiously believe this to be one of those cases; and that your honors will have less hesitation, in reviewing its merits, from the consideration alone, that your jurisdiction of it, is *original* and *exclusive*, and your decision *final*. Therefore, under the peculiar relations and duties of the court, as connected with this proceeding, we are led confidently, though respectfully, to ask for a new trial and hearing of the prosecution against the defendant, both in point of law and fact:

Because, he is advised, and believes his case has been misconceived in both these respects:

And further, because, since the trial lately had, he has discovered new and important testimony to his defence; and now has in his power, other and further proof, not used by him on his trial, as he was instructed by his counsel, to believe the same would not be necessary.

The counsel for the defendant would respectfully suggest, that the great stake which *he* has in this trial, is of itself sufficient to give it peculiar interest and consideration. In the present aspect, however, of the case, this is not its only feature of importance. We seri-

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ously believe, that the views of the judicial policy, with which the opinion rendered in this case, is made up, lead to the establishment of principles and precedents in our criminal jurisprudence, alike novel and dangerous. More than twenty years ago, it was decided in this court, that an information against a clerk to remove him from office, should be carried on in the name of the commonwealth, by the attorney general, a part of whose official duty it is, to attend to and manage the *prosecution*. It may then safely be assumed, that this is in the nature of a *criminal proceeding;* and of course, governed by the same rules and principles of decision, that regulate similar cases, in all the courts of the state. The decision referred to, was both wise and expedient; because the constitution is silent, as respects the mode of proceeding against a clerk, as well as the rules and principles of decision, which should be observed under it. It was, therefore, indispensable, that the court should both prescribe a mode, and declare the nature of the proceeding, to be enabled to act with either justice or accuracy. Every judicial tribunal, not absolutely capricious and despotic, must be guided by certain fixed principles, and legal land marks, in the decision of *every one* of the various and different cases, that may be brought before it. Hence, we have different rules of proceeding, as well as principles of decision, in the same court, in different cases. That which would be proper and applicable in a suit in chancery, or an action of assumpsit, would be equally the reverse, under an indictment for murder; and we cannot conceive, of a greater cause of injustice to parties, than in the confounding of those rules and principles of decision, or in mistaking their application altogether.

It is true, the constitution has confided the decision of the defendant's case, to a court of law, and not to a jury of his country. The reason, however, of this provision, is obvious. Clerks of courts, are presumed to be professionally skilled, in all the business of their several offices, and are required to produce a certificate to this effect, before they can be eligible for appointment. The correct performance of their various duties, as prescribed by law, requires not an incon-

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siderable portion of legal knowledge; of course, those only are competent to judge of the rectitude and validity of their official acts, whose knowledge of their duties, is presumed to be superior to their own. For this reason, it was, we have no doubt, the convention very wisely provided for the trial of clerks of courts, before the supreme judicial tribunal of the state. But, we premise with confidence, that the character of the tribunal before which they are tried, can neither change the nature of the proceeding against them, or the rules and principles of law, under which it should be conducted. In declaring the court judges of the *facts*, as well as the law, and requiring two thirds of the members thereof, to concur in a sentence of guilty, the constitution itself, apart from the decision above referred to, may safely be said to have pointed out, and defined the nature of this proceeding, and guarantied to every clerk on his trial, all the legal maxims that apply to a criminal case. We will not, however dwell longer on this point, inasmuch as it is unnecessary for us to enforce the reason of a rule, which has been deliberately established by a decision of the court, and is in every way consonant to the principles of public justice and policy.

We will now refer to some of the leading and settled principles of criminal jurisprudence, in contradistinction to what has been held applicable to civil cases only. On a criminal charge, the first great maxim is, that the accused shall be presumed innocent, until the contrary is proved; and that no man is bound to show his justification, under a *mere suggestion* of either fraud or felony. The *quo animo*, or intention, motive or design, with which an act has been committed, which forms the basis of a criminal charge, has ever been held to be of the last importance, under an inquiry of *guilt* or *innocence*. It is only as a free agent, or discretionate being, that man is held accountable for his acts. If, upon no other than this principle, he is answerable before the eternal tribunal, he certainly should not, before an earthly one, be made responsible for acts, as *crimes*, to which his will lent no *criminal* intention. It has been solemnly laid down as law, that crimes of all denominations, consist wholly

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in the purpose of the human will, producing the act. Under a criminal charge, therefore, the first inquiry is, as to the *motive* of the *actor*. In very many cases, the law declares the *act itself*, to be the best evidence of this motive, and will not suffer it to be contradicted, or explained. In many others, where the *act* does not *necessarily* fix a criminal design, the *motive* with which it is done, is always resorted to, it settling its character and consequences. Where this is the case, (and we contend, that of the defendant to be precisely the same,) the law declares, that every thing should be taken, and construed most favorably for the accused; and that his guilt, according to the principles here laid down, should be made apparent by evidence, uncontradicted, clear and conclusive.

Notwithstanding these well known, and long settled principles of criminal jurisprudence, the court have laid it down, as a rule of decision, in the present case, that, "In adjudicating upon the conduct of clerks, this court cannot enter into consideration of the *motives* which influence their conduct. The simple inquiry under the constitution, is, has a breach of good behaviour in office, been established by the proof? If it has been, whether it proceeded from ignorance, *good* intentions, or *bad*, the consequences are the same to the community." This, with submission to the court, is a doctrine to which we cannot subscribe; which is contradicted by the principles, on which all similar cases have been decided; and which, in its practical operation, would sweep from office every functionary of the government. If this court sits as a mere *standard* of the law, to pronounce its simple *dictum*; and, according to which, every case like this, is to be measured, regardless of every thing, *but the law;* why does the constitution provide, that "the court shall be judges of the *facts*, as well as the law?" This does not apply to a mere decision on the sufficiency of proof, to show that the law has been violated; because the proof is necessary to the judgment of the law, which it was not designed, should be abstractly, or hypothetically declared. But, in making the court the judges of the *facts, expressly*, as well as the law, the constitution certainly confers on them, and means

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they shall exercise a sound discretion, on whatever is calculated to fix the *true character* of the case, as it respects both the *act* and the *intention*. The counsel cannot perceive a difference in the principles of decision, betwixt this and a case of impeachment. Both proceedings lead to the same result; deprivations of office, for misbehaviour therein. Neither can they conceive a difference in the principles, or obligations, of official duty; but suppose, that the faithful performance of which, among all public officers, should be tested by the same rules and principles. It has been remarked by the court, that the duties of a clerk, are chiefly ministerial, prescribed, and definite; and therefore, according to the rule of decision above referred to, he is presumed to have neither official discretion, will, or design. It is true that the duties of clerks are principally ministerial: yet, we know that many of their official acts require both deliberation and judgment; that they have frequently to decide on the law, as it may, or may not be, and that the law requiring them to produce a certificate of qualification from the court of appeals, before they can be eligible for appointment, not only presumes, but requires them to possess capacity, knowledge and skill. Why, then, are they above all other public officers, to be deprived of *official motives?* In cases similar to this, the *motives* of public officers under trial for misbehaviour, have been held as a sacred principle of defence, and their right freely to go into them, in either justification or extenuation, has never been questioned, or refused. In the trial of Judge Chase, the most momentous and important known to the nation, this constituted the gist of the inquiry; every charge, or article of impeachment, against him, alleged corrupt motives in his official conduct, and the whole case was argued, and decided on the principle of *intention*. But, why need we resort to other cases, or analagous proceedings, when there is to be found, in the records of this court, nay, in the proceedings of this case itself, confirmation of the doctrines we advance. The information filed by the attorney general, against the defendant, is according to form and usage, in cases of this kind, and it is presumable, contains nothing but what is necessary to the legally setting forth the charges against him. What

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does that information aver? The *quo animo*, or corrupt intention and design of the defendant, is coupled with every charge, and constantly alleged, in his official acts, of which complaint is made. Notwithstanding this, the principle of the decision rendered, goes the length, that the commonwealth is not only excused from proving this important allegation, or averment, but that it shall not avail the defendant to *disprove* it. In the case of the Commonwealth vs. Thomas Arnold, clerk of the Bourbon circuit court, on a proceeding precisely similar to that against the defendant, upon almost every point, and under every charge, the court coupled the *motives* and *intentions* of the party, with his official acts. One of the charges against that clerk, was, his permitting one Miller, to act as his deputy, without the requisite and legal qualifications. This was fully proved; and an act of the legislature adduced, and relied on by the attorney general, which forbid deputies thus to be employed, by any clerk, under a penalty of £500. In reply to this, the court, in their opinion in that case, say, "the defendant must be admitted to have acted incompatibly with the strict duties of his office." But this they allow to be *palliated* by circumstances, going to show no improper *intention* or *design*, in the clerk. Arnold repeated this offence, *even after the information was filed against him;* yet, the court said his conduct in that was not of a character, which ought to induce his removal from office, because, they say, "the proof is satisfactory, that his having done so, was not the result of any thing like contumelious behaviour, but *an honest conviction of its propriety and correctness.*" Another charge against Arnold, was, his refusing to issue process in particular cases, when legally and properly called on so to do. The proof accorded with the charge. In reply to this, the court said, his reason for such refusal, was not *satisfactory;* but they thought it "sufficient to excuse him from a *wilful* abuse of the duties of his office." And the court further say, in reference to this same charge, "It is impossible for a candid mind, after reviewing the reasons assigned by the defendant, to hesitate in acquitting him of any *corrupt* or *impure motive.*" Again, Arnold was also charged with having made out a false and imperfect record, in a particular

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case, and refusing to correct the same when called on so to do. To this, the court also say, "the evidence is insufficient to establish a *corrupt* or *wilful* abuse of defendant's office, he being honestly *of opinion*, that what was alleged to be necessary in the record, did not, in truth or law, belong to it." We will recite one further charge, with the decision of the court on it, in the case of Arnold; he was charged with having exacted, and received, illegal fees in his office. Upon this, the court say, "We might have entertained a different opinion, if any thing like *corruption* or *impure motive*, was *proved* to have actuated the defendant in charging fees for services, before, in fact, the services were performed;" a positive law, then in force, interdicting clerks from issuing their fee bills for services, until they were performed.

Here then, with submission to the court, we have principle supported by precedent and authority; and a full and unqualified recognition of the position, we presume, in this case; that this being a criminal proceeding, it should be conducted and decided on, according to the same rules and principles, that apply to criminal cases generally; and that the *motives* and *intentions* of a clerk, when accused, become a fit subject of legal inquiry, as they go to fix and establish the character and tendency of the acts, of which he is charged. Under the opinion in the Commonwealth vs. Arnold, just referred to, we might go even further than this: there, the court, in commenting on the charge of taking improper or illegal fees, use this emphatic expression: "We might have entertained a different opinion, if any thing like corruption, or impure motive, *was proved* to have actuated the defendant," &c. Here, a legal violation of the defendant's official duty was shewn; nevertheless, the court, in conformity to the averments of the information as filed, which allege an impure motive in the defendant, seem to require proof of the truth of those averments, and in the absence of this proof, to presume the defendant's innocence. Thus, the defendant is not merely permitted to justify his conduct, by his motives, in shewing them to be *good*, but the prosecutor is required, in accordance with the allegations of the information

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filed against him, to prove them to have been *bad*. Notwithstanding the force, and high authority, of this decision, we do not ask for the defendant, any thing further, or more, than permission to justify himself according to his motives, by which, with an examination of his official conduct, under the rules of criminal inquiry, he is willing to stand, or fall.

In declaring, what is hereafter to be the settled law, touching the duties and responsibility of clerks of courts, the court, in the opinion, of which we pray a revision, further say: "In conclusion, we shall state, that good behaviour in a clerk, consists in discharging *accurately*, and faithfully, and in proper time, all the duties required of him by law; in making *correct records* of the judicial acts and proceedings of his court, under the superintendence of the court, so that the whole record, when signed, shall have received the approbation of the court; and then, in preserving the records so made, inviolate and unchanged, subject alone, to such amendments as may be made by the court; and in certifying that which the law requires him to certify, and that which the record warrants him to certify, and *nothing more* nor *less*."

The above may be looked on as a positive declaration of the law, now settled and adjudged, and intended to operate on all cases hereafter, similar to that in which it is given. Considering what may be the *future* influence or effect of the rules thus laid down, the counsel for the defendant, would have no motive at this time, either to recognize their fitness, or question their propriety; but, with reason to believe, that they were conceived in reference to the case of the defendant, and had their influence in leading to the conclusion upon it, as notified from the bench. We are constrained, with proper respect for the court, to apply to those rules, the objections to which we think them entitled. For the present, we will not attempt to discriminate betwixt the rules themselves, and the construction which the court has given them; but consider of the effect of the rules under the construction they have received. In thus defining the rules of good behaviour in clerks, we are to understand from the court, that whatever may be

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done or *omitted*, contrary to those rules and principles of duty, constitutes a *breach* of good behaviour. For the court have, as before referred to, said the simple inquiry under the constitution is, "has a breach of good behaviour been established by the proof?" If it has, no matter what the *intentions* of the party may be, he is declared to be culpable. As far as these rules of "good behaviour" go, they were no doubt intended to be obligatory. The meaning of the court, it is believed, cannot be misunderstood. The opinion rendered on this point, is *declarative;* it defines and specifies, and without saying what may not be done, it declares what *shall*. Of course then, the court have declared in this decision, that a violation of either of the rules of official duty, therein prescribed and settled, for the behaviour of clerks, shall hereafter constitute cause of removal. Is there a clerk in the commonwealth, let his qualifications and integrity be what they may, who could hold his office for three months, under an application of these principles of decision? Not one. In the language of a former chief justice of this court, alike distinguished for talents and integrity, the well earned, and most elevated reputation of a meritorious clerk, would, for the least error in office, be degraded by the sentence of the law, to a level with the vile and corrupt, who, by *labor of office*, shall have inflicted the most serious outrages on the community. "A principle, (say the court in the case of the commonwealth vs. Arnold) which thus tends, in its consequences, to place on an equality, *guilt* and *innocence*, cannot be admitted the correct doctrine of the law." To this opinion of the court, as formerly expressed, we can all adhere; because, it carries with it, self evident convictions of truth and justice, and leads to no consequences, that innocence should dread. But, where a breach of good behaviour in office, and an unintentional violation of any positive duty of such office, are declared to be one and the same thing, we may look for consequences equally perplexing and disastrous. This doctrine is destructive of the grounds of public confidence, as well as the principles of public service. It leaves no motive to official integrity; confounds the guilty and the

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unfortunate, and deprives merit of its reward, in making no discrimination betwixt the *good* and the *bad*.

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The counsel in this case, in thus considering of the consequences of a decision, need not, it is hoped, declare that they do not thereby intend the slightest disrespect to the court. The case before your honors is a highly important one; of the greatest magnitude to the defendant, and likely to furnish a precedent of serious consequence to the state. Therefore, it was thought, a free enquiry into the principles involved in it, would be neither unacceptable or improper.

In reference to the rules of behaviour in office, as laid down for the information and government of clerks, apart from the construction they have received, as applicable to the present case, we have no hesitation in declaring our conviction, that they are legal, just and salutary. It is the *construction* and *application*, which these rules are made to receive, to which we do most earnestly object. We have no doubt, but that they correctly point out and define the duties of clerks, whilst, at the same time, we cannot admit, that a violation of any one, or all of them, would, *of itself*, amount to a "breach of good behaviour" in office. Herein, with due submission, we verily believe the court have mistaken the true meaning and import of the constitution, by the construction they have put on the words "breach of good behaviour." The framers of the constitution never could have supposed that clerks would be *infallible*, or exempt from the usual portion of human frailty. What then is meant by the term *good behaviour?* Was it designed to express an *entire exemption* from *all* error, and perfect *official infallibility*, or used as a contradiction to its opposite, *bad behaviour? Good behaviour*, may be considered as a series of habitual rectitude and propriety, in reference to either official or private conduct; and *bad behaviour* precisely the reverse. An individual would acquire a reputation for either, just as his common habits might incline him to one point or the other. *Good behaviour*, like *good character*, may be looked upon as an *unit*, although made up of many acts and pieces of conduct. What would be a breach of *good character?* A mistaken motive of right or wrong, or any error incident to human frailty? To this we must all say no.

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A *breach of good character*, would require an *habitual* departure from rectitude and propriety, or the commission of some act of *essential turpitude*, and incompatible with the principles of right, justice and honor. In the same way, a *breach of good behaviour* in office, would require an habitual neglect of, and departure from, the duties of the same, or the commission of some act, shewing a *corrupt intention*, incompatible with the public duty and safety. We must receive and apply terms, as they are generally used and understood. What do we mean when we speak of the *good behaviour* of a governor, a judge, sheriff or any other public functionary? Do we mean an exemption from *all error*, and perfect *official infallibility* or a *general intention* and *habit of conduct*, to do right, as far as human nature and frailty will permit? We cannot hesitate in responding to this enquiry. Perfection and infallibility is not looked for, much less found in man; and we have no doubt, but that the framers of the constitution, in providing for the trial of clerks, and specifying the cause for which they should be removed from office, considered the term *good behaviour* in the same light that we have viewed it, and intended it should so operate and be received. Any other construction is contradicted by all the authorities and analogies of the law, and leads directly to the unjust and dangerous consequences which we have attempted to expose.

Before we advert to the view, which the court have taken of the evidence in this case, we will offer a few remarks on the subject of the *minute book*. In the argument of the case to the court, the counsel for the defendant, did not assume the position, that the minute book, without the signature of the judge, is of itself, a perfect and valid record. This they know is not the fact, whilst they did contend, and now repeat, that the original minutes of proceeding, when signed by the court, is a record, against which, a plea of *nul tiel record* could not prevail. The circuit court is a court of record; yet, the law instituting and organizing the same, does not specify or require any particular form or size of record, further, than that a fair and perfect record be kept of all the proceedings had in said court. There are many circuit courts in the state, where no

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other record is kept, than the book of original entries; what is called the minute book, and the order book, being both blended into one. The court, we have no doubt, point out what should be the practice, correctly, when they say that the orders of court should be extended daily, and signed by the judge. There are, however, but few of our circuit judges who adhere to this practice, but rely on the minute book, from one term to another, and sometimes even without signature, as evidence of their judicial proceedings. In the same court, of which the defendant is clerk, one of the counsel knows personally, that nothing was more common at a former period, than for all of the business of the three or four last days of a term, to be entered in the minute book only, and not carried to the order book, until the ensuing court. We do not offer these remarks in approbation of this practice or proceeding, but merely to show the court the impression which might have been made on the clerks in many circuits, as to the validity of the minute book. In the Scott circuit, particularly, this validity has been relied on, and often sanctioned by the opinion and conduct of the judge. We think it proper, that these errors and practices should be corrected, while we also think that the denunciations of this court, had better be directed against the circuit judges, than their clerks, who are all, more or less, under the influence and control of their respective courts.

Without the signature of the judge, and as presented to this court, we relied on the minute book as *evidence* only, that an allowance was made by the Scott circuit court, for Hans Peeples of $30, in September, 1820, although the same was not recorded in the order book; and as further evidence, that the defendant, had in *truth* and *fact*, though not of record, the order and sanction of the court, for the certificate he made to that effect; and as still further, and additional evidence that the defendant was guilty of no *fraudulent intent, or corrupt motive* in giving said certificate, because, he had the sanction of the court, for so doing, as is evidenced by the minute book; and might well have been deceived, and mistaken, as to his carrying the entry in the minute book, into the order book; which

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he alleges was really the fact, and the truth. Relying then on the minute book as *evidence only*, to support those facts, we refer the court to 1 Starkie, Ev. p. 72, where it is laid down, that even *private entries* are admitted as evidence, when made by a party, having peculiar means of knowledge, and made in the course of a *particular routine* of business, at the time of the supposed act. *A fortiori*, as was held by the supreme court, in the case of Nichols vs. Webb, 8 Wheaton, p. 326, are entries made in the books, of a notary public; and we say, *a fortiori*, are the minutes of a clerk in court, evidence, though, they be not *technichally* records.

If we be correct in the law, with the rules of its application to the present case, there is no difficulty in reconciling the evidence to the innocence of the accused. We received the declaration of the court, on rendering the opinion, that no *dishonorable* or *fraudulent intention* was imputed to the defendant, with great pleasure, both as it respects his character and feelings, and the very safe and favorable light in which it places his case. For if such be the impression of the court, which we have no room to doubt, we cannot resist the belief, that according to the authorities and examples here submitted, your honors can have no hesitation in acquitting the defendant of crime. We cannot suppose, in either public or private life, that the constitution and laws of our state, were ever designed to confound the *innocent* with the *guilty*, or on their application to the great purposes of society, that they require a construction subversive of the principles of both public and private justice.

The case of the defendant is now brought to a single point, of both fact and law, in certifying officially, the allowance of September, 1820. Was he justifiable, or excusable in committing that act? The court have said that he is neither *justifiable* or *excusable*, and have founded their opinion on the proposition. 1st. That the order in the minute book, of September, 1820, is not a record, and therefore, not *legally* certifiable by the clerk. 2d. In making such certificate he committed a breach of good behavior, for which they are *bound* by the constitution to remove him, without reference to

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either his *motives* or *intentions*. Here an issue of law is fairly and fully made up in the case, and upon which we would be perfectly willing to risk its final decision. The views, however, which the court have bestowed on many parts of the testimony, require of us, in justice to the defendant, some remarks in support of his conduct; and here, we might practically enforce the correctness of our remarks, as to the court's being judges of the *facts*, as well as the law. Reason and justice would forbid us to suppose, that the court intended, in a criminal proceeding, to establish a rule of decision which should operate partially on an accused. If the *motives* and *intentions* of a clerk, are not to be considered in *extenuation* of his acts, on a trial for breach of good behavior in office, is it just that they should be referred to in *aggravation* of his conduct? A doctrine thus monstrous, in either criminal or civil practice, it is believed, was never designed to be established, and could not, if even asserted, be adhered to and maintained. If the *motives* of the party, are not entitled to weight in this case, we cannot see the force of the chain of reasoning adopted in the opinion, to fix, by inference and deduction, an impure and dishonorable one on the defendant; unless it be a recognition of the doctrine for which we contend, as to the weight and force of *intention* in this and all similar cases. We are not to presume that the court, in this, have acted extra-judicially, or done any thing gratuitously, or that was unnecessary. To the court's having gone into the *motives* of the defendant, we offer no objections; our complaint is, that his motives and intentions have not been construed according to the liberal rules and principles of the law, governing all cases of this kind. Under a declaration of the court, that *motive* was not to explain, or extenuate error, it is impossible they could have received this construction.

It is not to be presumed that the court have been influenced by any part of the evidence relied on in this case, other than what has been presented, as material and operative, in the opinion itself. We might notice several minor points in the evidence, that have been adverted to by the court, could we possibly suppose they received the least weight in making up the decision; such as, that the certificate on the treasury, the

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report of Holland, &c. were in the hand writing of the defendant, the conversation in the clerk's office between the defendant and Rhodes Thompson, in presence of Major J. T. Johnson, that the entry in the minute book, of September, 1820, was at the *bottom of the* page, &c. &c. A suggestion even, should not be indulged, that the court would *insinuate*, what they have refused to avow. If the whole transaction, touching the order of September, 1820, was not *impure* and *corruptly criminal*, what have these things to do with it? The court, it is understood, have disclaimed an imputation of those *motives*. If the defendant had an improper, or criminal design, in his interview with Rhodes Thompson, Major Johnson is equally guilty; because, in his testimony he acknowledged himself a *privy* to that conversation, and explained the motives of it. In the routine of business, the order in the minute book might as easily have been thrown to the top, or middle, as the bottom of the page. The only question is, is there such an order? Is it genuine? That the order is there, is undisputed; and what it purports to *be, it is*, and must be so taken and considered, until the contrary is proved; was the contrary proven? certainly not; neither have the court so assumed in their decision. Then we presume the order must stand, and be taken for whatever it is worth, in justification of the defendant's motives in the case.

In reference to the testimony of Aaron Holland, we must be permitted to say, in our opinion at least, that the defendant has received great injustice from the construction given it by the court. In the first place, the defendant produced his minute book of September, 1820, wherein is an entry ordering $30 to be continued as an allowance to Hans Peeples, and that Aaron Holland be continued a committee, &c. He also produced a report of said Holland, dated the following March, and signed with his own proper hand, as proved by himself, wherein is set forth and said to the court, that he, Holland, had appropriated this same $30 to the use of the lunatic; the court say that the $30 was not appropriated by, or through Holland, on the ground that he *now* has no recollection of having so appropriated the money, and does not believe that

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he ever did. Now, in any case, civil or criminal, which, according to the settled rules of evidence, is first to be relied on, the memory of a witness, after a lapse of nine years, or his written report, under his own proper hand, of even date? We have only to advert to a whole current of decisions, for years past, of this court, on the relative weight and validity of written instruments, in comparison with parol proof and personal statements and recollections, to answer this question. The decision of the court upon this point alone, it is believed, is opposed to the settled rules of evidence, as well as the general policy of the law, in all cases whatever. But, this opinion is attempted to be justified on the ground that Holland's recollection, in contravention of his written acknowledgement, is aided and strengthened by the testimony of Lyle. To this, it is respectfully replied, is it not still parol proof and recollection, in contravention of written evidence, and this too, after a lapse of nine years? Take this as a general rule of decision, and where would it lead us? It is confidently hoped, that no decision in this case will form an exception to general rules; an observance of which, is always most safe and salutary.

The counsel, with submission to the court, do not rely on the lapse of time in this case, on any other ground, than, as it deprives the defendant of testimony which he then had, and would have been able to produce, and, as it furnishes the strongest and most unanswerable objections to nearly all of the evidence which is relied on against him; and this leads to a few remarks on the testimony of Mr. Lyle, with which we shall conclude. It will be recollected by the court that this witness swore to impressions, and not to words; that his general testimony was indefinite, and that he frequently qualified his statements, by declarations that "he might be mistaken." What reliance ought to be placed on this kind of proof, after a lapse of nine years? The court have sufficiently answered this question, by stating in their opinion, that they found his memory to have failed him on another branch of this same cause. The defendant fortunately, was enabled to *disprove* his recollection under one important charge; should it then have been relied on as PRINCIPAL support to another? We think not, and farther think, that the safest

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and best settled rules of evidence have been violated in the importance which has been given to the testimony of this witness, by the court. The general law, as to the weight which should be given to *impressions, conversations, recollections of words*, and *hearsay evidence*, is too well understood, and laid down with too much accuracy, to require comment by us. We cannot, however, refrain from giving the words of this court, in a decision, which embraces so emphatically, the grounds of our objection to the testimony of Lyle. In the case of Morris vs. Morris, 2 Bibb, p. 311, the court say: "The evidence in support of the appellee's claim consists of the declarations and confessions of Maurice Morris. Such evidence, in cases where it is admissible, is of the most unsatisfactory kind, on account of the facility with which it may be fabricated, and the difficulty of disproving it when false."

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Upon the foregoing points, the counsel for the defendant have not essayed to controvert the principles of the decision rendered, in discharge of their professional duties only, or with the view of merely combating, by argument, an opinion of the court. For both the intelligence and integrity of this court, they entertain the highest respect, and would not question the propriety of any decision made by it, without due reflection, and the sincerest conviction of being supported by both law and reason.

Crittenden and *Richardson*, for defendant.

The motion for a new trial was argued, and the following seperate opinions delivered by judges Robertson and Underwood.

Opinion of Judge ROBERTSON.

Response of judge Robertson to the petition for a re-hearing.

ANXIOUS to give to the evidence in this prosecution, a construction most favorable to innocence, and to escape, if possible, from the necessity of concurring in the judgment of amotion, I endeavored, with deep solicitude, to find some good reason, that would justify, to my own conscience and to the integrity of my station, the acquittal of the accused. The opinion, which after full deliberation and a close scrutiny of the facts proven, I was compelled to form on the case, did not allow this personal gratification.

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Hoping, however, that the zealous and able counsel of Mr. Chambers, might be able to present some consideration on an application for a new trial, which would suffer me to change my opinion, I was pleased that they presented and argued a petition for a reconsideration. I have carefully, and anxiously attended to all that has been said; but my former opinion remains unchanged.

The argument has scarcely touched the point which controlled my opinion, and has, therefore, not removed the difficulty which I had unsuccessfully endeavored to surmount. The counsel have relied chiefly on an alleged good motive for the main delinquency charged. They animadverted elaborately, on the expression in the opinion of the court, which states that the court did not enquire into the motives of the accused; and have insisted that motive is essential to the character and responsibility of every act. Whilst this is admitted, in its most unqualified extent, still it may be seen that it cannot materially affect this case.

The sentence in the opinion which has been subjected to criticism, and has formed the test of the argument by the counsel, has been misconceived and misapplied. Its phraseology may be, and certainly is more comprehensive and general in its import than was intended, or would be understood as intended by the court, when it is taken in connexion with other parts of the opinion, and applied to this case.

The doctrine which the court meant to maintain, was that acts might be done by an officer, *without corrupt motives*, which would amount to misbehaviour in office; that the acts for which the court sentenced Mr. Chambers to removal from office, were acts of that kind; and that consequently, *in such a case*, it was not necessary to inquire into motives.

The court did not certainly, mean to say that motives would be immaterial in any and every inquiry into the acts of clerks.

There are many acts of inadvertance, mistake, omission, unskilfulness, negligence, &c. which would be only misprissions of the clerk, when unaccompanied with improper motive or design. On a charge of de-

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linquency of this kind, the motive of the clerk, or whether there was any motive or not, would be not only material but indispensable to the complexion and the consequences, to the offices, of the act. Any corruption in office, is misbehavior in office; and, therefore, any official error of a clerk, instigated by motives of corruption or cupidity, however trivial or venal the act may be in itself, abstracted from the *quo animo* or intent, amounts to official misbehaviour. But small errors, resulting from a mistake or want of skill, or from inadvertence, or from the imperfections or frailties incident to all men, would not be considered breach of good behavior. Hence, in cases of this sort, the motive is essential. In the absence of any motive or of an improper motive, these acts should be excused, unless they were so frequent and habitual as to prove incapacity for the office. But if they were the result of corrupt or improper motives, they should forfeit the office, however minute they might be, or rare in their occurrence.

Such were supposed to be the charges preferred against Arnold, the clerk of Bourbon. And hence, in that case, the court exculpated the accused, because, they had no evidence of perverse intentions or dishonest motives.

But, if there are any acts, which, *per se*, without the aggravation of corrupt motives, constitute misbehaviour in office, whenever such acts are proved, an enquiry into motives, cannot be material to the decision of the court. They may be of great consequence to the accused personally. For good intentions, may rescue his character from degradation or reproach. But the sentence of the constitution, being dismission from office, on conviction, the inoffensiveness or integrity of motive cannot avert, or mitigate that sentence, any more than corruption could aggravate or extend it.

It was in this view of the subject, that the court, believing that the main charge against Mr. Chambers, was intrinsically such as to amount to misbehaviour, thought proper to waive all consideration of his motives. And in this I still think we were right.

The question then is, does the act charged, show, of itself, misbehaviour in office? The charge is, that Mr.

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Chambers presented in person, to the auditor, an official certificate, signed by himself, as clerk of the Scott circuit court, of an order in form and in *extenso*, purporting to be a true copy from the records of his office, when there was no such record; and on that certificate drew from the treasury $30. I thought, and am still compelled to think, (without any allusion to motive,) that if any official acts, unalloyed with a corrupt intent, can be considered a breach of good behaviour, this is one of them. If it is not, I have not yet heard of, nor can I imagine any act short of corruption, which can be misbehaviour.

One of the counsel admitted that there may be acts which, although untinged with corruption, amount, in the language and intent of the constitution, to misbehaviour in office; and they failed to show, indeed they scarcely attempted to show, that the act charged against Chambers, is not included in that class. They certainly made no effort to show what acts are included in this classification, or to assign any reasons for distinguishing, from those cases, the act imputed in this case. We are, therefore, left where we were before, to decide for ourselves, by the dim light of our own judgments.

If a clerk inadvertently omit to enter on his order book, a judgment rendered by the court, and noted in his minute book, no just or reasonable man would say, that this was such a breach of good behaviour as to subject him to removal from office; because all men, however faithful or honest, are liable to such accidental omissions; and punishment for an occasional neglect of this kind, could not accomplish the end of all just inflictions, viz: the prevention of similar accidents; and also, because that never was intended to be misbehaviour, from which no officer who is only a man, can hope to be entirely exempt. But if that judgment were against the clerk himself, and he wilfully omitted to enter it on his order book, for the purpose of promoting his own interest, all honest men, would denounce him as unworthy to retain his public trust; such is the importance of motive in each case. But suppose the clerk in a case in which he had no personal interest, shall have unintentionally omitted to enter a judgment,

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and after the adjournment of the court, the defendant having removed from the state, the clerk, on the application of the plaintiff, shall make out a formal judgment and certify it officially as a copy of his record, so as to enable the plaintiff to proceed on it, and imprison the defendant, in a foreign state, would this be a venal act? Would it not be misbehaviour in office? If it would not be, I am at a loss to conjecture what would be. No motive could make it less than misbehaviour.

The integrity of the public records should never be suspected. Their verity cannot be disputed. They are indisputable and conclusive, and the public interest requires that they should remain so. The record cannot be denied or contradicted, nor can any official certificate or authentication of a record, made in proper form, be drawn into question. Hence the indispensable necessity that clerks should be careful and scrupulously exact in the preservation and certification of the records of their courts. They are not permitted to alter a word or letter. They must not enlarge or diminish. They should certify "the truth, the whole truth, and nothing but the truth." They can never be suffered, with impunity, to certify, and thereby pass current, as true, that which they know to be false. Nor can they be allowed to certify as a true copy from record, any thing which they do not know to exist. If they shall be suffered thus to act, they may become extensively mischievous; and all the assurances of record and many other equally important rights will be jeopardized. We could then no longer appeal to the records of our courts and the certificates of our clerks as the sure tests of truth. A clerk, even the very best clerk, may, through accident or mistake, fail to copy in a particular case, every word of a record, which he honestly certifies as a full and perfect copy. This we know is sometimes unavoidable. We expect it to happen occasionally; and when it does happen, we look over it, because the most vigilant clerks cannot always avoid it. But any clerk, however negligent or ignorant, may avoid certifying as a copy from his record, *a judgment which is not on it.* No clerk should give a certificate purporting to be a copy from his record, without inspecting his record, and actually copying from it. He cannot be excused for authen-

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ticating as a copy, what does not exist, or what he has not seen and is totally ignorant of. He is a ministerial officer. His trust is a highly important one. He is the depository of the public confidence. His chief duties are to keep safely and copy truly. He must not usurp judicial power, and should be held responsible for every breach of duty, of which no careful and honest clerk can ever be guilty. He cannot be permitted to do that, which, if generally tolerated, must tend to the subversion of all confidence in his acts, and of all the securities of his office.

It is sometimes difficult to determine, whether a particular act amounts to misbehaviour in office. It is frequently a perplexing question, not to be solved by the application of any general rule or principle. But there is a plain test for this case. It is that, by which, and which alone, every question of moral fitness or public justice is determined. It is this: *is it better for the community and the cause of justice, that a clerk should be removed from office, for certifying as a true copy from his record, a judgment which the record does not contain, or that, by his acquittal, all clerks should be licensed to follow his example?* If Mr. Chambers shall be discharged, every other clerk may do as he has done, with perfect impunity. This is the inevitable consequence of his acquittal; and it might be fraught with tremendous results. Such an example might even tempt those who may be inclined to knavery, (if there be such,) to engage in the most corrupt practices, in the hope, that their villany would escape detection, under the guise of inoffensive motives, or the cover of accident, inadvertence or mistake; for fraud is artful, and cannot often be fully exposed. Besides, what more should be required than the simple fact, that a clerk has certified, what he knew did not exist, or at best, that of which he was ignorant?

I do not consider this a criminal case, in the sense in which the counsel for Chambers seemed to view it. If it were, some turpitude of intention would be required to be clearly proved. An officer cannot be punished for crime in this court. If he prostitute his office by the commission of a criminal act, in his official character, this is misbehavior, for which he should be re-

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moved. But for the crime against the laws of his country, he can be tried and punished only by a jury. There can be a gross breach of good conduct in office, without the taint of wicked motives. The public interest and the general welfare of the commonwealth, in my opinion, require, that this case shall be so decided as to guard inviolate, the archives of the state. It must be a case of misbehavior in office.

I am fortified in the opinion which I have reluctantly formed in this case, by the unanimous opinion of the court of appeals, in the prosecution against Barry, the clerk of Ohio county. The principal charge in that case, was, that Barry had erased the name of an individual, placed by the sheriff on the pannel of a grand jury. Barry stated that the man whose name was erased, was the malignant enemy of Barry, and that he feared that he would, if retained on the jury, endeavor to find a presentment against him unjustly. He knew that if this were so, the court would discharge the man from the jury, on being informed of these facts; and that, consequently, he had reason to suppose that he was not committing a great error, by running his pen across his name. The public could sustain no great injury by such a practice, if it should be tolerated, because the court and the sheriff could prevent any mischievous abuse, and there could be no difficulty in procuring a grand jury. Barry, in this case, was not influenced by any very reprehensible motive. It is even rendered probable that he did not believe that he was doing wrong; his counsel, Clay and Allin, so argued; and they urged with all their great power and eloquence, the same arguments about motives, &c. which have been so eloquently addressed to this court. But it was all unavailing. The court removed Barry from office. The counsel, dissatisfied with the judgment, struggled for a new trial; they failed, and their client lost his office. The court, in this case, after noticing the palliating circumstances urged in favor of Barry, say: "the preservation of the files, records and returns in the various departments of government, is of such importance, and the violation of duty in that respect, by *an officer himself*, is of such dangerous example, that nothing can justify it; *and*

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the motives in this case cannot be considered by this court, as palliating the offence." This is strong and direct authority.

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Another charge against Barry was, that a replevin bond, filed in his office, payable to Handly, for whose benefit judgment had been obtained in the name of Perkins, was altered in his presence, by Handly, so as to make it payable to Perkins, the nominal plaintiff, and that Barry afterwards issued execution on the bond thus altered. His counsel again insisted that their client was not influenced by any selfish or personal motive; that the bond was in form, merely, defective, and might be quashed, because it did not correspond with the judgment in the names of the parties; that Handly was the beneficial party, and Barry ought not to be made responsible for the act of Handly, which was only intended to correct an accidental error, especially as the debtor made no complaint. But the court disregarded this argument and decided, that for this too, Barry ought to be removed from office. In their opinion on this charge, the court say, "the defendant's counsel have insisted, that as the judgment and execution were for the use of Handly, although obtained in the name of Perkins, which probably occasioned the mistake in taking the replevin bond, the alteration tended to the attainment of justice, and that therefore, the defendant, having that in view, cannot be criminal.

"This argument is founded on the monstrous maxim 'that the end justifies the means.' Can it possibly be right that the clerk shall make himself the judge between the parties? That by an erasure or *alteration* of the papers or *records* of his office, he can be permitted to change or alter the situation or rights of the parties, in the absence and without the knowledge or consent of one of them? The dangers to the community resulting from such practices, give a sufficient answer."

Here there was no sinister motive; no person was or could be directly injured; the money was going to Handly, and it was immaterial to the debtor whether the bond was payable to Handly or Perkins. So thought Barry, and therefore suffered Handly to make the alteration. Yet for this he was removed from office; and his sentence was just and was approved.

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Whoever will read this case, will find that it is not as strong as the case of Chambers, and presents a more favorable aspect. Barry petitioned for a reconsideration, and his able counsel presented to the court, in the most imposing garb, the prominent arguments which distinguish the petition in this case. Among other things, they insisted that the acts proved on Barry were innocent and *neutral*; that no person was injured or complained; that he did what he thought was right: was uninfluenced by corrupt or unworthy motives; that if he erred, his error was one of judgment, to which all men, however virtuous and enlightened, are liable, and that every clerk in the state should be expelled from office, if it was right to remove Barry, &c. &c. But in overruling the petition, what did the court say? I will only give the following extracts:

"As to the second charge, it has been contended that the defendant had nothing to gain by the alteration of the bond; that it would have been more to his interest that the bond should not have been altered, but that it should have been quashed by the court, as he would, in that event, have gotten more fees by it; that there was no criminal intention.

"These statements may be correct, but whether they are so or not, is not material with the court. The act of permitting the alteration was a deliberate one, it was a voluntary one, and it was unlawful; *nothing*, therefore, can justify it."

"It is said that this court ought not to remove for bare error in judgment; this is correct to a certain extent, and yet it does not bear upon this case. First, because this is a case in which the clerk had no right to judge; nor is there any thing in the law concerning the duties of clerks, or any known custom or general practice among them, which seems calculated to have misled the defendant into such an assumption of judicial functions; as well might he have attempted to give judgment itself. And, secondly: If he really was in error with regard to his authority, it shows such gross ignorance as to render his tenure of the office, dangerous to the community. Were such practices permitted, what security could individuals or society at large have, for the safety of their property, their rights to

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which, depend upon the records, which, in themselves, import such absolute verity, that they cannot be contradicted. With what ease might the covenant in a deed, a judgment or a will, be most essentially changed; and all this might be done and excused upon the whimsical or capricious judgment of the clerk, by which he might be misled into the belief that he was furthering justice. If the grounds of the defence in this case are supportable, and if the clerk's allegation, that he conceived the alteration was for the furtherance of justice, alleging that if he did wrong, it was only an error of the head, not of the heart, would be sufficient to warrant this court in permitting him to retain his office, what clerk could not come forward, covered with such a shield of defence even against an accusation of the most flagrant and outrageous injustice?"

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This was a sufficient answer to the petition of Barry, and it certainly applies as well to that of Chambers. Chambers has done more than Barry did. He has presented to the auditor, for the purpose of drawing money, a paper certified by himself as clerk, purporting to be a formal order of the court in detail, entered on his record book, when there was no original, from which the copy could have been transcribed. Was not this a voluntary act? Was it not an improper act? Was it not an act which, if generally sanctioned, may lead to the most injurious consequences? What might be expected, if such a privilege be accorded to all clerks, and similar practices should become common among them? Are they to be suffered to alter their records, or to make judgments *ad libitum* for the court, whenever they may suppose that no harm will be done? Are they, (which is even worse still,) to authenticate, as copies from their records, judgments, or other things, which they do not contain? Let any just, or wise, or prudent man, answer these questions in the affirmative, if his conscience will allow him to do it, and he will find that he is giving his sanction to a doctrine, which will render clerks irresponsible, and make the constitution, practically, a dead letter, as to them and their acts.

It has been asked, why, if a clerk should be removed for correcting or supplying a judgment, he should

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not be equally liable to removal, for omitting to enter a judgment given by the court, or should enter it erroneously? The answer is easy and has already been given; the best clerks may, and often do, forget to make full and perfect entries, or commit errors in entering or copying judgments; all men may be expected to fall into accidental omissions of this sort, and therefore, for such an error alone, no clerk ought to be dismissed. But clerks are not liable to the mistake of altering judgments, making judgments, or certifying as judgments what are not on their books. It is impossible that such a mistake can occur, When there is no record, the clerk cannot, through mistake, write out, in form, what purports to be a copy; and if one who may do so, shall be excused, all others must be permitted to do so, and then there will be no check on them but their own discretion, and no security for the citizen but their intelligence and integrity.

The opinion in the case of Barry, shows that clerks may do acts which amount to misbehavior in office, whether their motives are good or bad; *and it clearly sustains this court, in the opinion, that the acts proved against Chambers, are such as imperiously require judgment of amotion.*

The minute book is not entirely free from suspicion. But I am not inclined to examine this topic, because it is not indispensable to the argument, that I should do so. But if the entry now shown on the torn out leaf be genuine, (and if the other leaves which were torn out contained no recision of it,) it does not tend, in the slightest degree, to prove that the certificate of Chambers was true, or that he was authorized to make it. If the judge render judgment for A. vs. B. which is noted in the minute book, but not entered on the order book, shall the clerk, because he knows that judgment was given, and believes that the omission to record it will be corrected at the next term, be suffered to issue an execution on it, or write out, in form, such a judgment as ought to have been entered, and certify it to be a copy from his record? If he be permitted to do this, what shall he not do?

To place the conduct of Chambers in the most favorable light, it is not less improper than the act just

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supposed. It is that act precisely. Can any thing then, be proved, to justify his acquittal, when it is admitted that he drew up a formal order, and certified it as a copy from his record, knowing that it was not a copy, or not knowing whether it was or not? The authority of the case of Barry, and the clear convictions of my own mind, would not allow me to acquit him, if there had been no evidence, except the solitary fact that he certified as a copy, what had *no original*. But the counsel deceive themselves, if they suppose that the parol evidence furnishes any palliation for this glaring error.

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The court did not wish to affix on Mr. Chambers any mark of reproach; nor by attributing to him dishonest intentions, to wound his sensibility or touch his moral character. I still hope that Mr. C's. conscience may never rebuke him for impure motives. But if there has been an obliquity of purpose in his conduct there is certainly nothing in the testimony which could satisfactorily vindicate him from its imputation, or rescue him from the degradation, which the proof of it would justly bring down upon his moral character. I am not disposed even to intimate, that the evidence would justify a judicial decision, that there had been any wicked or sinister design manifested in this unfortunate transaction. Whatever the world may think when the facts shall be scrutinized, and whatever, personally, I might be authorized to suspect, I would not, as a judge, if motive were essential in this case, pronounce sentence of guilty. And I do cherish the hope that Mr. Chambers has not been guilty of any reprehensible designs, whilst I regret that he has failed to counteract, as satisfactorily as would have, no doubt, been desired by himself, the force of some facts intended to excite suspicion that his aim was selfish. He says, however, in his affidavit, that he can now explain those facts.

The evidence stated in the opinion of the court, was detailed, as stated, and the counsel have not complained of any material error in that statement of it. Lyle, it is true, was unable, in speaking of conversations with Chambers, to repeat the precise words used; but he often said, in giving his testimony, that he could not

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possibly be mistaken in the fact, that Chambers, in the spring after the money was drawn by him, acknowledged to him that, wanting money in Frankfort, he had taken the liberty to draw the allowance to Hans Peeples, supposing that he could take that liberty with him, Lyle; and that on being told that there was no order for the allowance, on the record, he replied, if so, it could be arranged at the next court. Nor can there be any mistake in the fact, that Lyle has the receipt of Mrs. Peeples, for the three months for which Chambers had drawn. It was also proved, as stated in the opinion pronounced in this case, that Holland never acted as committee; had never drawn a cent of the allowances, and certainly did not sign or know any thing of the order, which purported to be signed by him, and by which Chambers drew the money from the treasury. Chambers himself, seemed to admit that the signature was not Holland's, and he made no attempt to prove whose it was or how it was procured. He seemed to admit, and so did his witness, J. T. Johnson, that Holland's name was not written by Rhodes Thompson, a former committee, and Thompson himself swore that it was not.

From these indisputable facts, it may be inferred that Chambers had presented the order without the knowledge or authority of Holland; drew the money to meet some personal exigency; had not accounted for it when Lyle had a conversation with him in the spring after the money was drawn, and that he procured the report to be signed by Holland, to the March term, to give sanction to what he himself had done; Holland knowing nothing about the facts, reported as he and others swore.

Now, whether all these facts are evidence of improper motives, is for others to judge. They may be consistent with perfect integrity; Chambers might have neglected or forgotten to pay over the money, without intending to appropriate it fraudulently to his own use, possibly he had paid it; he might have supposed there was no impropriety in signing or suffering some other person to sign, Holland's name to the order, believing that if the money should be drawn, the mode of getting it would not be important; after he discovered that

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Lyle ascertained that it was probable the money had not been appropriated to the use of the lunatic, Chambers might have honestly thought that it would be right to tell Lyle how and why it had been drawn, and thereupon, account to him for it; although he had not been entitled, before, to receive it; and he might too, have supposed, that although there was no allowance made on the record book, yet as the court had intended to make one, there would be no impropriety in certifying a copy of one such as it would have been, if it had been made, and presenting it as the true copy of a genuine original.

All this may be true. I wish it may be, and cannot say that it is not. But I must repeat, that there is nothing in the facts proved, that can, in the slightest degree, extenuate the acknowledged and unjustifiable act of presenting a false certificate, knowing it to be untrue, or at best, not knowing it to be true. The entry in the minute book, if genuine, did not authorize the certificate. The paper exhibited as a copy of the record, is not a copy from the minute, and does not resemble it, but is a copy of what the order would have been on the record book; and the clerk had no more right to certify such a paper, as true, than he would have had to certify a formal judgment, from the note in his minute book, when no judgment had been entered on the order book.

The alledged discovery of new testimony cannot, as may have been seen from the tenor of this argument, have any effect on the petition for a new trial. If it had been produced on the trial, it could not have had any essential influence on the decision. It might possibly have given to the case a more satisfactory moral aspect; but it could have had no other tendency. It is strange, however, that if it exist, it was not offered before. Most of the witnesses, if not all, mentioned in the affidavit, were in court during the trial.

There is not the remotest analogy between the case of judge Chase, and this case; nor is there any fitness in the comparison of this to a prosecution for murder, or other crime. The difference is so essential and obvious, that it is not necessary to state any reasons to make it more plain. This court can take no cogni-

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sance of crime, except so far as it affects official conduct.

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The counsel in argument, expressed an apprehension, that the opinion against Chambers, would, if applied to other cases, result in the removal of every clerk in the state. I hope not. It would be as humiliating as it would be alarming, to ascertain that clerks generally, have been guilty of such an abuse of the trust confided to them, as that established on Chambers. But if others have done as he has done, they ought to give place to those who would understand and perform more faithfully, their important duties. And if other clerks have taken the liberty to make records without authority, or to certify as copies from their records, what has no resemblance on the record, whether with or without motive, it is the more necessary that it should be known as soon as possible, that such practices are not to be tolerated. The best interests of the people demand that such malfeasances shall be corrected, and prevented in future. It is earnestly hoped that the example furnished by this case may have a salutary effect.

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As to Mr. Chambers, he may derive some consolation from the fact, that he is not the first who has been doomed to the surrender of his office, to the public interest. Barry has gone before him, and if he had learned prudence from the lesson taught in Barry's case, this never would have occurred. It is his misfortune that he did not profit by that example. But if he shall be so fortunate as to enjoy the approbation of his own conscience, his greatest, and I would trust, his only loss will be that of his office, which he ought to be willing to offer up cheerfully, to an inflexible principle of public policy, which, without regard to motives, forbids the act which he has done.

I have been unable to hear or see any reason for changing my opinion in this case. I would have been relieved from anxious and painful feelings if I could have changed it. But my convictions of my duty are clear, and cannot be resisted. No event of my life could have given me more satisfaction than I would have enjoyed if I could have pronounced a judgment of acquittal. But personal considerations must not

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control public duty; justice must prevail, whatever may be the individual consequences.

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Believing that my duty to my country and to my own conscience, demands that I shall not sanction, by my opinion, the acts proved against Mr. Chambers, I cannot acquit him of the charges preferred against him, and must, therefore, adhere to the opinion which has been given. In doing this, I am sustained by the case of Barry, and by my own clearest convictions of public duty. My judgment cannot compromise with my feelings, nor can my official conduct be directed by my personal wishes.

The importance of the case has induced us to present separate replies to the petition.

Having no longer time for the preparation of this response, than that which has elapsed from the last adjournment of the court, it is, I have no doubt, liable to very just criticism. But whatever may be its imperfections of style or method, I am perfectly satisfied with its principles. I believe they are such as the integrity and veracity of the public records, imperiously require this court firmly and uniformly to maintain, in defiance of all personal consequences; and as far as I may have the power to affect them, by my opinions, they shall be maintained undeviatingly, in every case in which it shall appear that they are in peril.

If Mr. Chambers' intentions were good, the judgment against the act alone, cannot injure his character. If they were improper, an acquittal for that act could not justify or extenuate them.

What I have said of motives, I considered proper. The petition required this much. I do not wish to be misunderstood. Whilst I would be unwilling to decide that the motives of Mr. Chambers were corrupt, candor will not permit me to say that I could, upon the evidence, give them the sanction of my unhesitating approbation.

The task which I have now performed, was extremely unpleasant to me. But entertaining the opinion which I do, I had no alternative but to remove Chambers, or to sacrifice my own judgment. Justice must

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take its course; therefore, the opinion delivered in this case, must remain unaltered.

Opinion of Judge UNDERWOOD.

Response of judge Underwood to the petition for a re-hearing.

THE interest manifested in behalf of the defendant, by his learned counsel, the importance of the result to the individual accused, and the belief seriously entertained, as declared in the petition for a new trial, "that the views of judicial policy with which the opinion rendered in this case, is made up, lead to the establishment of principles and precedents in our criminal jurisprudence, alike novel and dangerous," have induced the members of the court to reconsider their former opinion, and to give to the application for a new trial, that attention which the magnitude of the interests involved imperatively required.

I should deeply regret if, at this early period of my judicial life, I were instrumental, in the smallest degree, in establishing principles and precedents, alike novel and dangerous. I am sure that no pride of opinion would induce me to adhere to the doctrines and principles heretofore advanced, when my judgment is convinced that they are radically erroneous. That man who prefers holding to error for the sake of consistency, at the expense of his conscience, may hide a corrupt heart from the world, but he cannot conceal it from himself.

The first point which I shall re-investigate, is that which relates to the *motives* of clerks, and the consideration which this court should give their *motives*, when arraigned for official misconduct. The opinion delivered states, that "in adjudicating upon the conduct of clerks, this court cannot enter into a consideration of the *motives* which influence their conduct, &c." I am convinced that this language is too broad, and that it would be detrimental to give it the unlimited operation which the counsel for the accused seem to think the court intended it should have. It was only used and intended to be applied by the court to certain supposed and enumerated offences, which, if established, would require the removal of a clerk from office, and which ought not to be excused on account of the purity of the motive that may have influenced their per-

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petration. The moral conduct of men, I admit, is to be judged of and determined, by the purity or turpitude of their motives; but the official conduct of men is not exclusively to be measured by that standard. The effect of tolerating official misconduct, because the motive of the officer was pure, and establishing a universal rule, that there should be no *amotion* from office in those cases, where the detrimental acts of officers can be satisfactorily traced to a good motive, would overturn those principles of responsibility and accountability which the constitution, from considerations of public policy, has wisely secured in regard to clerks. If these answers were received, "I did not know it was wrong;" "I really meant no harm." "I erred from the best motive. I now know my duty and will observe it in future;" and the court by being satisfied that such answers were founded in truth, were to dismiss the accused, content with the apology, such a course would, in my opinion render useless that check upon official delinquency which the constitution has provided, and which the welfare of the community requires this court to enforce. Suppose evidence is set out in a bill of exceptions, and signed by the court, and the clerk should obliterate or insert the word *not*, so as to change the entire meaning of the testimony, ought he to be excused because his motive was pure? I think not. And why not excuse him? Because public policy forbids it; because the toleration of such conduct would license all other clerks to do similar acts, relying on good motives for protection, and thus distrust and suspicions in regard to our records and judicial proceedings, would be introduced, which would be in themselves evils deeply to be deplored. It was from the contemplation of striking cases such as these, that the language was used, intimating that this court could not enter into the consideration of motives, and as applicable to such cases, I still think it correct. But there are many acts which may be performed, that would or would not amount to breach of good behaviour in office, just as the motive which prompted them might be vicious or virtuous. To this class may be given such acts as the court, in the case of Arnold, adjudicated upon, by bringing in his motives to determine the character of the act, and various others similar in their

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nature. The case of Barry presents instances of official misconduct, which the court would not permit any honesty of intention to justify. Speaking of Barry's conduct in suffering the replevin bond to be altered, and which act was defended upon the ground that there was no criminal intention and no interest which could have operated on Barry, to induce him to permit the alteration, the court say, "the act was a deliberate one, it was a voluntary one, and it was unlawful; nothing, therefore, can justify it." The court says further: "If he (Barry) was in error with regard to his authority, it shows such gross ignorance, as to render his tenure of the office dangerous to the community." The authority of this case confirms my opinion that there may be cases of official misconduct not to be excused by any consideration of motives. In regarding the clerk in such cases as a moral agent, as a man, I would respect and consider his motive; but in regarding him as an officer, I would only look to his act as violating the duties of his station, in the correct performance of which duties, society has so much at stake. And I would say to him as a judge, "your motives may have been pure but I cannot sanction, on that account, acts of such dangerous tendency, by permitting you to remain in office."

The acts of clerks are principally ministerial, but they are, to some extent, judicial or *quasi* judicial. For instance, in preparing a record for the court of appeals, they must necessarily judge and determine what constitutes the record; what belongs to it and what does not. In such a case, if the clerk withholds what is part of the record or inserts what does not belong to it (unless the violation of duty be so palpable as to show corruption in the very act,) and should be prosecuted for that cause before this court, it would be very proper to consider the circumstances and motives which influenced his conduct. So likewise, in many other cases, the motives and reasons of his conduct might be given in evidence, for upon them might the establishment of a charge of breach of good behaviour entirely depend. It was not intended by the opinion heretofore delivered, to close the door and to make no allowances for these imperfections to which all are subject, in every station of life. In the multifarious

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duties which clerks have to perform, that mistakes should sometimes be made by the most accurate, is to be expected, and I trust no rule will ever be established, which will construe a mere mistake into a forfeiture of office, or to preclude an investigation into the motive and character of the transaction, to ascertain whether it be a mere mistake or something worse. I am sure no such thing was intended by the original opinion in this cause. But, notwithstanding this, I am still of opinion that there are cardinal points to be observed by clerks in their conduct, and which, if disregarded, will place them in a condition where no purity of motive should save them from removal. Among these are, the alteration of their records and the certifying as a record, what does not exist. I cannot permit a clerk to excuse himself in these cases, by urging that the alteration was designed to make the record as it ought to have been in the first instance, and that he acted with the best intentions, or that he made out and certified as the record, that which, although not true, he had every reason to believe was true. I can readily suppose that a clerk, in copying a record, may make a mistake by leaving out a word or sentence, or that he might insert one word for another, or that he might inadvertently introduce a word having no relation in meaning to the subject matter of the record; but I cannot well imagine that he could introduce whole sentences, foreign to the subject matter of the record, and thereby give a different meaning to the record, without design. But to suppose that a clerk could make out and certify as the record, what does not exist, and that he could do so without committing a palpable breach of good behaviour, would be to indulge in conjectures and to frame excuses for official delinquency, against all propriety and reason. How can such a thing be done? not by having the record before him, for that cant be present which does not exist. The clerk must, therefore, fancy to himself that there is such a record, and then, without looking for it or getting it to copy from, he must make out the certified copy according to his recollection. This, in my opinion, is manifestly improper, and if clerks will undertake to act from memory, without having the record before them, they must abide the consequences in case

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their memory deceives them. The case is much worse where there is no record, and consequently the idea of making the recollection of a thing which never existed, justify a clerk's conduct, is a palpable absurdity. Suppose A recovers a judgment against B for $100, and wants a copy of the record to be used in another state, in what light should the conduct of a clerk be viewed, who, from having a vague or a vivid recollection of the recovery, should undertake, from his memory, to make out a copy of the proceedings for the use of A, without looking into the papers and record? Suppose the copy so made out, did not impose a quarter extent of liability on B, although the variances between the copy and the record, in a variety of particulars, were striking upon the slightest comparison? Could any court refuse to remove a clerk who would thus act? I think not. And yet it might be urged in his behalf, that B could not be injured by giving to the false copy, all the force and effect of the genuine record, as by it he was not compelled to pay more than he should do, and that no bad motive could possibly operate to induce the clerk to make such false copy. All this might be true; the clerk may have been influenced by a desire to perform the business with speed, and may have conscientiously thought, that it was not worth while to delay and hunt up all the papers and the record, to make out a literal copy, and then to examine and see that it was correct. Ought a judge of this court, in such a case, to enter into a consideration of the clerk's motives, with a view to excuse him for such a dereliction of duty? I think not; and I am moreover of opinion that if this court were to do it, and set a precedent in such a case, by the acquittal of the delinquent, that it would amount to absolution on the part of the clerks, from all system and order, and that the interests of the community would not fail to suffer deeply by the establishment of such a precedent. The present case is much stronger against the clerk than the one supposed. It is not a false copy of an existing record; but it is a fabrication, founded on an imaginary record.

Viewing the subject in the various aspects in which it has been presented, my mind has settled on this conclusion, that there are acts of official misbehaviour,

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which should admit of no palliation, so far as it regards removal from office, by the purity of the delinquent's motive; that there are acts which, *per se*, constitute sufficient cause for *amotion* and imperatively require it; and that there are acts susceptible of such explanation and mitigation, from the purity of the motive which induced them, that they will not amount to breach of good behaviour in office. I cannot concede the position which seems to be assumed, that the rules applicable to the trial of criminals, for breaches of the penal laws, are those that should govern, to their full extent, the trial of clerks for breaches of good behaviour. It is not necessary to express any decisive opinion on this point, and I will not enter into any argument in relation to it. Nor do I wish or intend to disturb, by any opinion in this case, "the known and long settled principles of criminal jurisprudence." I do not admit that it is necessary to attach to a clerk the turpitude of a criminal, to justify his removal from office. A very honest man may make a very indifferent clerk, and a man despicable for his vices, may make an excellent clerk. It is proper to seperate the character of the man, from the character of the officer, and when that is done, it may readily be perceived that there might be great propriety in making a distinction between the rules for the trial of the man for crime, and those for the trial of the officer, for breaches of good behaviour in office. This court has no power to remove a clerk for crimes committed, so long as he discharges the duties of his office well, nor should it be induced to overlook breaches of good behaviour, because the officer is honest as a man, or acts from good motives. The case of judge Chase, impeached before the Senate of the United States, is not considered as parallel to the present. If it were necessary in his case to consider the *quo animo* with which he acted, in every instance, to justify a conviction under the charges and specifications brought forward against him, I do not perceive how it would necessarily follow, that this court should be controled by the *quo animo* of a clerk. The case of Barry is an express authority to the contrary. The act of altering or making a false certificate of a record, in its consequences, is the same, let the *quo animo* of the clerk be what it may.

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good or bad. Removal from office is not intended as a punishment for the criminal act of the clerk, but it is designed to protect the community by insuring the faithful discharge of official duty, and by securing a preservation and integrity of the records. For criminal conduct, clerks cannot be punished before this tribunal. In Barry's case the court would not listen to a charge of bribery. The counsel for the accused, seem to me, to have looked upon the sentence of removal, as a punishment for some crime. It is not, I think, to be viewed in that light. If a clerk commits a forgery on the record, this court would remove him for it, but it would belong to the circuit court to punish for the crime.

The next ground of objection to the opinion delivered, grows out of the operation of those rules defining what is good behaviour in clerks; or rather, the objections spring from the manner in which the counsel for the accused have supposed that those rules will operate, and it is insinuated that no clerk, no matter what his qualifications and talents may be, can hold his office three months under the application of those rules to their conduct. I should regret that so much rigour should be found in any rule of this court, as to operate oppressively upon any class of citizens. I do not believe that the rules which only require of clerks the performance of their duties, can ever operate so as to cause the removal of those who, possessing the requisite capacity, attend with reasonable diligence and honesty, to the discharge of their duties; and if they should so operate as to produce the removal of those who are destitute of capacity, or those who negligently attend to their duties, it is to be hoped that their places will be supplied by others, who will better serve the community. Any supposed rigour to be found in the language employed in the original opinion, in regard to the exclusion of the motives of a clerk from consideration, has been mitigated, I trust, as far as it should be done, by the views contained in the responses to the petition for a new trial. When the court, after considering the evidence, are convinced that the clerk has been guilty of a breach of good behaviour, and that the act, if tolerated, would be dangerous in its

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consequences, the duty of the judge cannot be discharged but by passing sentence of removal. It is intimated, that to constitute a breach of good behaviour, in the sense of the constitution, it is necessary that there should be a continued series of bad acts committed by the clerk. While I admit that mistakes and misjudgments, which are not corrupt, may be overlooked as not amounting to such breaches of good behaviour as will justify the removal of the clerk; yet I am of opinion, that one act of dangerous example and mischievous tendency is enough. I see no reason for waiting until more mischief is done, with a view to say, "behold a series of bad acts; it is time to remove you." On the contrary, I think it more compatible with reason to say, "here is one bad act; you ought not to have an opportunity to commit another."

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In respect to the minute book, when it is signed and adopted by the court as the record, I would regard it so far as to justify a clerk in acting upon it, as matter of record. It is the fault of the judge and not of the clerk, that such memoranda as are to be found in a minute book, with their defective brevity, should have the character of records imparted to them. The acts of the clerk, therefore, within the scope of these memoranda, may and ought to be tolerated. But so far as my knowledge extends, I have never understood that any clerk ever regarded the minutes made by him, and not sanctioned by the approving signature of the judge, as a justifiable foundation for any official act. I am clearly of opinion that such minutes ought not to justify any official act of a clerk. I am also, thoroughly satisfied that the understanding of every one, conversant with a minute book and record proper, recognizes the invalidity of the minutes, unless signed by the judge. I cannot, therefore, bring my mind to yield its assent to the propriety of permitting a clerk to excuse his official misconduct by taking shelter behind the leaves of an unsigned minute book. The very fact, that the judges sometimes sign the minutes where they cannot be carried at length, on the order book or record proper, for want of time, is conclusive to show that the minutes, not signed, are not to be regarded by the clerk as the basis of any official act. To justify Chambers in this case, even upon the score

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of motive, we must first believe that he regarded the unsigned minute as equivalent to the record; or that he did not believe it was necessary to consult the record; or that he thought looking at the minute was enough; or that he thought it was sufficient to act from memory. Now it is difficult to believe that any clerk could entertain such notions; and if I were convinced that a clerk did entertain them, seriously and honestly, I should pronounce him destitute of the talents necessary for his station. It does seem to me, therefore, that the fact which has been established, beyond all doubt, that Chambers did certify, as of record, an allowance for the support of Hans Peeples, when there was no such record, and when he had no proper ground upon which to assume the existence of such a record, does, *per se*, amount to such misbehaviour as justifies his removal, and when it is coupled with other facts in this case, I see no room for doubt or hesitation. I will not recapitulate the evidence; it is set out correctly in the former opinion, so far as it relates to the charges upon which the sentence of the court is predicated. I do not recollect to have said, when the opinion was delivered, any thing not contained in the within opinion. I am sure that I did not.

In the review which I have taken of the opinion heretofore delivered, and its principles, aided by the petition which has been presented, I have discovered nothing which induces me to think the sentence against Mr. Chambers, wrong. It is, therefore, my opinion that it remain unchanged.

I have also considered the affidavit filed, and am of opinion that the motion for a new trial should be overruled.

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CASES

DETERMINED AT

THE SPRING TERM, 1820.

Dawson, &c. vs. Clay's heirs.

CHANCERY.

Appeal from the Bourbon Circuit; GEORGE SHANNON, Judge. Case 39

Administrators with the will annexed. Fraud. Measure of responsibility. Negligence. Securities. Publication. Absent defendants. Jurisdiction. Unknown heirs. Statute. Practice. Non-residents.

Judge ROBERTSON delivered the opinion of the Court. April 11.

THIS is a suit in chancery, brought in 1823, by the heirs of Samuel Clay, deceased, against the administrator with the will annexed, of the decedent, and the securities of the administrator, and against the administrator and heirs of Thomas Bedford. The bill alleges that the will of S. Clay, which was proved in 1810, directs that 1,200 acres of land, in Henderson county, Kentucky, for a title to which, he held the bond of T. Bedford, should be sold, and 200 acres of land in Bourbon county, should be purchased with the proceeds of sale, for his son, Thos. Clay, and the residuum of the sale money, if any, should be equally divided amongst his other children. That the administrator got the possession of the bond; that it was not known what he had done with it, or with the land, but believed that he had, by some means, rendered himself responsible for the value of the land, and, therefore, a decree to that extent, is asked against the administrator and his securities. Complainant's bill.

An amended bill states, that Bedford had no title to the land, and prays against his administrator and heirs, a decree for the consideration, ($1,600,) and interest from its advance, which was at the close of the year 1800. Amended bill.

No answers are filed, except by the securities, who deny their liability, and require proof of all the material allegations of the bill. Answers by part of the defendants.

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It is proved that the bond on Bedford, dated in 1800, for a title to 1,200 acres of land in Henderson, was in the possession of the administrator; that he went into the Green river country for the purpose of getting a title for the land, and not finding all the heirs of Bedford, left the bond with one of them, who promised to procure a deed and send it to him; that the administrator said that the heir with whom the bond was left, wrote to him that he had lost it. It is also proved that Bedford had no title to the land described in the bond, but had a claim in the same neighborhood, which had been sold for his debts.

Facts proved in the cause.

In this state of case, the circuit court decreed against the administrator and his securities, $1,600, with interest from the 1st of January, 1801, until paid; from which the securities have appealed to this court.

Decree of the circuit court

There are several obvious errors in the record:

First: As the administrator had removed from the state before the institution of the suit, the court had no right to decree against him, without service of process, either actual or constructive; and neither is shown. There is an order to advertise, but it does not appear that it was ever executed. The decree takes it for granted that it had been regularly published; but this is not sufficient. The certificate of publication should appear. It cannot be dispensed with, because if there ever had been one, this court cannot decide on its sufficiency, without seeing it.

No decree can be rendered against a party, unless there have been actual or constructive service of process.

Second: Some of the heirs of Bedford are alleged to be unknown, and the others non-residents; but there is no affidavit that any of the heirs were unknown. Such an affidavit, to be filed in the clerk's office, is required by the act of 1815, 1 Dig. 61. As, therefore, the heirs of Bedford were necessary parties, the court erred in rendering a decree without bringing them regularly before the court.

The statute of 1815, 1 Digest, 61, regulating proceedings in Chy. vs. unknown heirs, requires affidavit.

Third: It does not appear that the order of publication against Bedford's heirs, had been executed.

Fourth: In decreeing damages, compounded of the principal advanced, and legal interest from the date of the payment, it was erroneous to decree accruing interest after the decree and until final payment.

Decree for interest till payment upon aggregate decreed, erroneous.

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The foregoing errors, although comparatively subordinate, are sufficient for the reversal of the decree. DAWSON, &c. vs. CLAY'S HEIRS

But there is an error more radical. The allegations and proofs did not justify the decree against the administrator and his securities, even if the cause had been well prepared.

It does not appear that the administrator was guilty of fraud or gross negligence. It does not appear that he ever received a cent for the 1,200 acres of land, or could have recovered any thing. There is no evidence that Bedford's heirs had title to the land, or were able to refund the consideration, and that they were accessable, or that the heirs of Clay had sustained any other injury, by the acts or omissions of the administrator, than the delay and inconvenience peculiar to a suit in chancery on the lost bond, and which would not be incident to a suit at law against Bedford's heirs, for a breach of the bond. But the reverse of all this is proved, or may be inferred from the proof. It was, therefore, not just and proper to make the administrator and his securities responsible for the price of the land, with interest. Decree against adm'r in his own right, erroneous unless fraud or gross negligence be proved:

If he had been delinquent, he should have been subjected to liability to no greater extent than the injury actually sustained by Clay's heirs. And from the proofs in the cause, that was only the difference in the cost of a proceeding in chancery and at law, against Bedford's heirs. His responsibility could not be greater, unless it had been proved that by his fraud or gross negligence, a greater injury had resulted to Clay's heirs; and to show this, it should appear that Bedford's heirs could have conveyed title, or paid the value of the land, and by the negligence of the administrator they had been suffered to part with the title, and become insolvent: See Thomas vs. White, 3 Litt. Rep. 177; Head, &c. vs. Perry, &c. 1 Mon. Rep. 257. An administrator is not liable, without proof of bad faith; same cases and 4th Johnson's Ch'y. Rep. 419. But there are other and equally conclusive objections to the decree. Then no greater responsibility than the actual injury caused. An administrator not liable, unless he act with bad faith.

The administrator with the will annexed, was appointed before the act of 1810, vesting such an administrator with the powers delegated by the will to Quere. Does the statute of 1810, extend-

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executors; and, therefore, in our opinion, it is very questionable whether that act could give him more power than he had when he was appointed. If it could not, as we are inclined to believe, consequently, as without that act he had no power to sell land devised to be sold, he has never had any power in relation to the land, and could not be responsible for not obtaining title to it, or for not selling it. Be this, however, as it may, there is no evidence of fraud or of bad faith, or of any special damage to Clay's heirs. Nor could the administrator be made responsible for not suing on the bond, for damages; because,

ing the power of administrators with the will annexed, operate on such as obtained administration prior to the date of the act.

First: It does not appear that there had been a breach in the lifetime of the testator, and for a breach after his death, his heirs alone could sue.

Second: The will devised a sale of the land, and therefore, the administrator ought not to have sued for a breach of covenant to convey title to it. For if there had been a breach before the death of the testator, he had, by his will, declared his election to obtain the land specifically, and not accept in lieu of it, the value in 1800. The heirs of Clay might have sued for a title, or for damages; and from any thing appearing in the record, they had the sole power to do so. It is quite clear that even they could not have gotten the land. But having the right to sue Bedford's heirs for breach of the bond, if it occurred after S. Clay's death, they had a right to the bond. And if the administrator withheld it from them, and by gross negligence, lost it, they might justly ask of him to pay them the difference between a suit in chancery and one at law. But even to entitle them to this limited demand, they must show that the administrator refused to let them have the bond. The decree is erroneous on the merits.

If testator devise the sale of land for which he holds a bond for a conveyance; it is a determination of his election, and controls his representative to require a specific performance.

As the evidence did not authorize any decree against the securities, the court of Bourbon can entertain no jurisdiction against the non-residents, the land not being in Bourbon; and, therefore, if the appellees shall desire to proceed against the non-residents, they must do so by a new suit.

Decree reversed, and the cause remanded with instructions to dismiss the bill.

Hanson, for the appellants.

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Miller vs. Miller.

Question upon a devise.

Appeal from the Trigg circuit; B. Shackleford, Judge.

Case 40.

Devise. Administrator. Husband and wife. Coverture.

Judge Robertson delivered the opinion of the Court. April 11.

This is an agreed case; and its decision depends on one isolated question of law, viz: whether the administrator of the husband, or the surviving wife, is entitled to money devised to her during coverture, and not received or otherwise disposed of by the husband, in his lifetime. Statement of the case.

The circuit court decided that the administrator of the husband is entitled to the legacy. Decision of the circuit court.

This decision is evidently wrong. The doctrine on this point has been so long and so clearly settled, and the decisions upon it have been so uniform by the courts of England and of most of the American states, so far as known by this court, that it was not to have been expected, that the right of the survivor could be, at this day, called in question.

The choses in action belonging to the wife, before marriage, do not vest in the husband until he assigns or otherwise appropriates them. If he die without making any disposition of them, they survive to the wife. But if the husband survives the wife, he is entitled to them, by the construction of the statute of distribution. And the administrator of the wife (if other than her husband,) is a trustee for the husband. Bingham, 208–9; Com. Dig. title Bar. and Fen. E. 3; 6 Johnson's Rep. 112; Butler's note 304, to Coke Litt.; 3 Atkins, 527; 1 Pr. Wm. 381, 383; 3 Litt. 281; and many other cases which might be cited. Choses in action which belonged to a woman prior to marriage or accrued to her during coverture, survive to her if she survive the husband; unless he have appropriated or reduced them to possession; if the husband survive the wife, he is entitled to them, under the statute of distributions.

Choses in action which accrue to the wife during coverture, such as bonds or legacies to her, may be appropriated or otherwise disposed of by the husband. But if he die without receiving or making any disposition of them, they survive to the wife. Com. Dig. title Bar. and Fem.; 3 Bac. Abr. 65; 1 Mad. Ch'y. 381–2–3; 1 Chitty, 18, 19, 20, and the cases there cited; Bingham, 210; 3 Bibb, 499; 1 Bac. Abr. 501; Cro. Ja. 77, 205; 3 Litt. 282; 4 Hen. and Mun. 453; many other cases might be cited.

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The same authorities show that if the husband survive the wife, he is entitled to legacies or other choses in action, which accrued to her during coverture. See especially, Com. Dig. Bar. and Fem. 10; and Toller 224.

The wife having survived the husband in this case, is entitled to the legacy, which her husband did not dispose of or receive. It is a chose in action.

The judgment of the circuit court is, therefore, reversed, and the cause remanded, with instructions to give judgment for the plaintiff.

Triplett, for appellant; *Denny* and *Mayes*, for appellees.

DEBT UPON INJUNCTION BOND. Case 41.

Harrison vs. Park.

Appeal from the Christian Circuit; B. SHACKLEFORD, Judge.

Debt. Injunction bond. Evidence. Instruction. New trial. Practice.

April 11. Judge UNDERWOOD, delivered the opinion of the Court.

Statement of the case, set out in plaintiff's declaration.

PARK brought an action of debt in the court below, upon an injunction bond against Harrison. The declaration claimed the penalty of the bond, viz: $1300, and alleged damages for the non-payment of the penalty to $200. The condition of the bond was in substance, to prosecute the injunction with effect, or to pay and satisfy Park, the sum of $450, and also $280 79 cents, with interest from December 20, 1821, until paid; and also, all damages, costs and charges which might be awarded or adjudged to said Park, in case the injunction was dissolved, dismissed, or the complainant in the bill cast therein. The declaration avers that the injunction was not prosecuted with effect, but that the same, at the July term, 1826, of the Christian circuit court, was dissolved; that the court then and there awarded to Park, ten per centum damages, on the amount of the judgment at law, and his costs expended in defending the suit in chancery. The damages are averred to be $150, and the costs

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$30. Breaches are then assigned in the non-payment of the sums mentioned in the condition of the injunction bond, and in the non-payment of the damages and costs awarded as aforesaid; in consequence of which, the declaration alleges a right of action accrued to Park, to have and demand of Harrison the said sum of $1300, the amount of the penalty. The declaration then concludes in the usual form, avering the non payment of said $1,300, to the plaintiff's damage $200.

Defendant's plea.

Harrison plead that he had well and truly kept and performed the conditions of the injunction bond; on which plea issue was made up.

Plaintiff's evidence and instructions asked by his Counsel.

On the trial, Park by his counsel, read the declaration and injunction bond to the jury, and then moved the court to instruct the jury upon that evidence, (which was all that was given on the trial of the cause,) that in the absence of all proof in support of the plea, they should find for the plaintiff, the debt in the declaration mentioned, to be discharged by the payment of $450 and $250 79 cents, and interest thereon, and ten per centum damages on the principal.

The court gave the instruction, to which Harrison excepted. After this Harrison's counsel asked and demanded leave of the court to address the jury, as to the nature and extent of the verdict they should find; which being refused, an exception was filed to the opinion of the court. After the plaintiff had concluded his evidence, the defendant's counsel moved the court to instruct the jury as in case of a nonsuit.

Instructions asked by the defendant.

The court refused to give the instruction asked for, to which the defendant excepted. The defendant then moved the court to instruct the jury that, if they believed the evidence, they could not find higher or more damages than $200, that sum being the amount laid in the writ and declaration. The court refused to give this instruction, to which the defendant also excepted.

Verdict for plaintiff, motion for new trial, and overruled.

The jury found for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of $1036 92 cents, in damages, and the court rendered judgment accordingly. A new trial was moved for, and the causes assigned for it, were the errors committed by the court, and the want of evidence to jus-

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tify the verdict. The court overruled the motion for a new trial, to which the defendant likewise excepted. The assignment of errors in this court, questions the correctness of the several opinions given by the inferior court, in the progress of the cause, and in overruling the motion for a new trial. The sufficiency of the declaration is also questioned.

Declaration sufficient.

The declaration, we are of opinion, contains a good cause of action. The extent of recovery upon it will be considered in adjudicating upon the other errors assigned, which will be taken up in the order stated.

To a recovery in action on an injunction bond, it is essential to shew the injunction has been dissolved. A plea of conditions performed, admits all the facts that are well alleged, and assumes the proof of performance.

First: The legality of the instruction given by the court, on the application of the counsel for the plaintiff, will turn on the extent and nature of the evidence before the jury. The plaintiff's right to recover upon the bond, was conditional. It depended upon the fact, whether the injunction granted, was or was not dissolved at the institution of the suit. If then dissolved, the plaintiff had a right of action on the bond. It was indispensable that this fact should have been established on the trial. It was not established by reading in evidence, the decree of the court dissolving the injunction. Was it established in any other way? We think it was. The declaration, in appropriate language, averred its existence. It was not denied by plea. On the contrary, the defendant plead that he had performed the conditions of the bond. He had nothing to perform in regard to these conditions until the injunction was dissolved. The plea, therefore, must be regarded as an admission that the event had happened upon which the liability of the defendant accrued, and that he, thereupon, took upon himself the burden of proof to show that he had discharged himself from liability, by performing the conditions of his bond. These conditions show that on the dissolution of the injunction, the defendant was liable to pay $730 79 cents, with interest from the 20th December, 1821, and all damages and costs awarded by the court, against the complainant in the bill of injunction, upon the dissolution thereof. The declaration was, that the court awarded ten per cent. damages. This is not denied by the pleading, and in addition thereto, the law gives ten per cent. damages on the dissolution of

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the injunction, on the amount enjoined. One of the stipulations in the condition of the bond, is to pay the amount of the *damages* which may be awarded. Considering, therefore, the evidence furnished by the injunction bond, and the facts which ought to be taken as admitted under the state of the pleading, we think the instruction given by the court substantially correct.

When there is an express stipulation in an injunction bond to pay damages, the security is responsible, notwithstanding the silence of the acts of 1796, 1798: a proper construction of those acts render securities liable, as far as the principal may be.

It has been urged in argument, that there is no law rendering a security in an injunction bond responsible for ten per cent. damages on the dissolution of the injunction, and as the appellant was sued in that character, judgment for such damages, could not legally have been rendered against him. We are not willing to concede the correctness of the position assumed. On the contrary, we conceive that a proper construction of the acts of 1796 and 1798, on the subject, could render the security liable for all sums his principal may be bound to pay, in consequence of the injunction; but whether this be so or not, in this case, the appellant has expressly agreed to pay the damages, and we know of no principle of law which renders this agreement invalid, or which requires us to refuse to enforce it. The cases of Moore vs. Gorin, 2 Litt. 186, and Stevenson vs. Miller, 2 Litt. 306, are strong authorities against the validity of the argument made to exonerate the appellant from the payment of the *damages*, because the statutes requiring injunction bonds may not have said expressly, that one condition of such bonds shall be to pay the *damages*. These authorities are conclusive in all cases where there is an express stipulation to pay the *damages*.

When the nature and extent of a verdict are determined by the instructions given by the court, it is not error, to refuse to permit the counsel, against whom the opinions

Second: The second error assigned, questions the propriety of the decision of the court, in refusing to permit the counsel for the defendant to address the jury on the nature and extent of the verdict they should find. We see no error in this. The court, by the instruction given, had fixed the nature and extent of the verdict, and there was nothing to discuse, unless the counsel intended to assail the instruction given, and thereby appeal to the jury as a revising tribunal, to correct the errors of the court in deciding the law. In *civil* cases no attorney ought to desire to proceed in

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such a manner, and if he did, no court should tolerate it. Such a practice would lead to confusion and error and often to manifest injustice. Where there are a multitude of facts in a cause, requiring explanation; where the evidence is contradictory, and where, as in cases of tort, the jury may give damages according to their sound discretion, we are willing to concede that an attorney, in behalf of his client, may demand, as a right, the privilege to address the jury; but even in these cases, he ought not to be permitted to assail the instructions of the court on matters of law. A different rule ought to prevail in cases of contract, where the facts are clear, and all on one side. Our courts of justice would progress but slowly with business if they were compelled to hear long speeches from the bar, in every action of debt, and petition and summons. But even if the inferior court erred in refusing to let the attorney speak, yet if the cause has been decided correctly, we will not reverse it, merely to give an opportunity to make a speech.

have been rendered, to address the jury.

Difference between the rule in actions of tort and of contract.

Third: The view of the case already taken, is sufficient to show that the court did not err in overruling the motion to instruct as in case of a nonsuit.

Fourth: The fourth error assigned questions the propriety of the opinion of the court, in refusing to instruct the jury, that if they believed the evidence, they could not find higher damages than $200. This instruction was not asked, because the evidence proved that the plaintiff was not, in justice, entitled to a larger sum, but because no greater damages were laid in the declaration. It is a well settled rule, and perhaps without exception, that a plaintiff at law cannot recover more than he claims, and had this been an action of covenant, or any other discription of action, where the recovery sounded in damages exclusively, we should not hesitate to decide, that the court erred in refusing the instructions; the authority of Bealler's administrator vs. Schoals executor, 1 Marshall, 477, and many other adjudications of this court, which might be referred to, are conclusive on this point. But this is an action of debt, for a specific sum, the amount of which is $1,300, and this is the sum actually claimed, and for which the judgment has been rendered.

Distinction between debt upon a bond with conditions, and *covenant*.

Plaintiff no right to recover more than he claims.

The damages laid in an action of debt, are to cover the injury resulting from detention; the' in this

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It is true, that as the record stands, this sum is not to be collected. It is to be discharged by a lesser, which the jury have expressed in damages, as a commutation for the greater sum recovered. Here then, the plaintiff is not permitted to recover more than he claims. In fact, he does not get as much, although he gets more than the amount of damages laid in the declaration. The damages laid in the declaration in an action of debt, do not limit the demand as in actions of covenant, assumpsit, trespass, &c. The damages laid in a declaration for debt, are designed to cover the injury the plaintiff sustains, by reason of the detention of the debt, and in general, the plaintiff is only entitled to nominal damages; the detention, being compensated by the rendition of the judgment, with interest from the time the debt became due. But if the debt were contracted in a foreign country, in which case it would be erroneous to give judgment for interest in the usual form, then the jury might find more than nominal damages, to compensate the plaintiff for the detention of his debt. The damages so found, should not exceed those laid in the declaration. If they did, and judgment should be rendered for the debt and damages so assessed, it would be error, because in such case the plaintiff, by the judgment, would recover more than he claimed. Such is not the present case. Here the damages assessed by the jury, are not recovered in addition to the debt, but are substituted for the debt itself, not enlarging but limiting the amount of the claim. Rendering judgment for the sum demanded in an action of debt, to be discharged by a lesser or other sum in damages, is an anomaly resulting from statutory innovations, upon common law principles. It seldom, if ever, occurs, except in actions of debt for penalties. At common law, the whole penalty was recovered, and execution issued for the whole amount. Courts of chancery first interposed to relieve the defendant at law, and to restrict the recovery to the amount of the injury actually sustained. By the statute 8 and 9, Wm. 3; Ch. 11, s 8, of which the 6th section of our act of 19th December, 1796, relative to civil proceedings, is a substantial transcript, actions of debt for penalties are so modified that the debt is commuted by the damages actually sustained. A correct exposition of the

case, the recovery sound in damages; yet it is compounded of the debt and damages, and does not exceed the demand, but limits it.

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law on this head, may be found in 1 Saunders, 58, note 1 and 2; Saunders, 187, note 2. According to the doctrine contained in the first note, the judgment should be rendered for the debt and nominal damages, for which execution should issue; but to be endorsed that the damages assessed and costs only, are to be levied. In this case the judgment is for the penalty alone. There is no judgment for any amount in damages, nominal or otherwise.

The mode of entering up judgment, approved.

The entry of record, that the judgment is to be discharged by the damages assessed, is according to the practice, and we see no objection to it; see the case of Lear, &c. vs. Smith; Litt. Select Cases, 122; nor do we perceive the violation of any principle in the refusal of the court to instruct the jury to limit their finding, to the damages laid in the declaration, in cases like the present.

Fifth: The refusal of the court to grant a new trial, is assigned for error. The damages assessed, do not exceed those which ought to have been found under the principles laid down. On this point we find no error.

The judgment of the court below is affirmed with damages and costs.

Triplett, for appellant.

J. J. Marshall 1 jm 176 110 838 — DEBT ON ADMINISTRATOR'S BOND. — 1 jm 176 114 302 Case 42.

Hobbs and Churchill, vs. Middleton.

Error to the Jefferson Circuit: HENRY PRATLE, Judge.

Administrator. Securities. Demurrer. Practice. Pleading. Judgment. Bar. Devastavit. Statutes.

April 13. Judge ROBERTSON delivered the opinion of the Court.

Statement of the case.

JOSEPH MIDDLETON obtained a judgment, in the Jefferson circuit court, against Wm. C. Hobbs, as administrator of Peter Woolford, in a petition and summons on the following note. "Due Doctor Joseph Middleton or his assigns, the sum of one hundred and sixty seven dollars and sixty-two and a half cents specie, it being the amount of his medical account, against the estate of Peter Woolford deceased. Witness my hand, this 14th day of June, 1825.

W. C. HOBBS, Administrator."

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The execution on this judgment was returned, "*nulla bona*;" Middleton then brought an action of debt against Hobbs, with a suggestion of a "*devastavit*;" and having obtained a judgment by default, issued an execution "*de bonis propriis*," which was returned "no property;" whereupon this suit was brought on the administration bond, in the name of the commonwealth for the benefit of Middleton, against Hobbs, and Churchill and Buckner, his securities.

Plaintiff's declaration.

The declaration, after reciting the note and two judgments, executions and returns aforesaid, makes profert of a copy of the administration bond, and avers in substance, a sufficiency of assets, at the date of the note, and a waste of them by the administrator, to which a demurrer and four pleas were filed; the first plea, is by Hobbs, and alleges only, that a former judgment had been obtained against him which was in full force; the second is by the securities, and avers that the note was for Hobbs's individual debt, and was executed by him fraudulently, to make the assets liable for its payment. To each of these pleas a joint demurrer was filed, which the court sustained as to the first; but overruled as to the second. Issue was then taken on the second plea. The third plea is by the securities, and is, in substance "no assets," and that the judgment was obtained against Hobbs, by his fraud and negligence; a demurrer to this was sustained; and issue to the court was taken to the fourth; which was a plea of *nul tiel* record.

Demurer. Pleas filed by defendants.

Judgment was obtained against Hobbs and Churchill, the suit having abated as to Buckner; various errors are assigned; but it is not deemed necessary to notice them specifically.

Judgment for plaintiff.

The declaration is substantially good; it contains on a reasonable construction, all the facts necessary to shew a good cause of action. The suit is maintainable against the securities and principal jointly.

Declaration sustained.

Whether a recent opinion of the late judges Bibb and Owsley, from which judge Mills dissented, deciding that two judgments against the administrator, one establishing the debt, and the other fixing a *devastavit*, are necessary before the security can be

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sued, shall be considered as the settled law or not, is immaterial in the consideration of this question. We shall however notice that opinion presently.

The two judgments required by that opinion, had been obtained against the administrator in this case, before this suit was instituted.

Upon a joint and several bond, either one or all the obligors must be sued. The responsibility of principal and securities in an administration bond is the same.

We cannot doubt that it was proper to sue, as well the administrator, as his securities on the official bond. The bond being joint and several, either all, or only one should have been sued on it. The administrator had never been sued on the bond before. He was not liable to suit on it sooner, or for any other cause, or to any greater extent, than the securities were. They are responsible on their bond, whenever he is; and when he is not, they are not; and consequently, when they are not, he is not. When the principal is not liable to a suit on his bond, his security certainly cannot be sued on it. A bond by principal and securities, on which the latter could alone be sued, would be an anomaly. If the judgment for a *devastavit*, against the administrator, exempt him from suit on his bond, it equally and for the same reason, would absolve his securities. The principal may be sued alone for a *devastavit*.

Convicting administrator of '*devastavit*,' does not release him from his liability upon his bond; it only determines the extent of responsiblity, and binds him personally, as well as in his fiduciary character.

This does not extinguish his liability on his bond, according to the decision referred to, it is necessary to fix his liability on his bond. For if the *devastavit* be essential to the liability of the securities on their bond, it must be equally so to that of their principal and co-obligor, on the same bond.

Fixing a *devastavit* on the administrator, does not release him from the obligation of his official bond. It only establishes his accountability more clearly, and makes it personal as well as fiducial.

It was therefore right to sue the administrator with the securities, and of course the former judgments against him constitute no bar, and consequently Hobbs's plea was immaterial.

It was not strictly, regular to file a joint demurrer to the plea of Hobbs, and to one of those offered by the securities. But this irregularity, can have no material effect now; nor should it have been considered

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material, when it occurred, as the plea of Hobbs was virtually no plea at all, and needed not to be noticed.

The second plea filed by the securities, was also improper. It was, that the debt for which the judgment had been rendered against the administrator, was not that of the administrator, but of Hobbs, individually. The responsibility of securities being incidental and collatteral to that of the principal, a judgment in favor of a creditor, against the administrator, concludes the securities, as to the existence and character of the debt thus ascertained, and cannot be questioned or reviewed in a suit on the official bond. As the judgment was against Hobbs as administrator, the securities therefore could not deny that he owed it as administrator.

Judgment against administrator concludes the securities, as to the nature of the demand;

But if the securities were not estopped from gainsaying the truth of the judgment, there would be another objection in this case, to the sufficiency of the defence attempted in their second plea. The note on which the judgment was rendered, was executed by Hobbs as a fiduciary, and expresses the consideration to have been a debt due by his intestate. Hobbs could therefore have escaped the payment of it, by sustaining plea of no assets, or *plene administravit;* 1 Saunders, 210, and N. 2, 211. Roberts on Frauds, 206. But if Hobbs had been personally liable, he was also responsible as administrator, and therefore the securities are also bound eventually by their bond, and after two judgments against the administrator, cannot plead that the debt was not that of Hobbs as administrator, unless they impeach the judgments for fraud *by the creditor* in obtaining them. The plea does not charge any fraud on the creditor. And surely a fraud by the administrator alone, cannot release from the claims of his creditors, the securities in his official bond, given for his faithful and upright administration.

Whether the debt was personal, or as adm'r was not to be questioned in a suit upon the official bond, unless fraud be alleged against the creditor.

Even if the creditor had obtained his judgments by fraud, it is worthy of consideration, whether the only remedy for the securities, would not be a bill in chancery, to avoid the legal effect of them.

Quere—Whether bill in chancery be not the appropriate, if not the only remedy?

We have been unable to detect any error in the opinion of the court on the plea of *nul tiel* record.

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If a plea contain a sufficient answer to the pl'tff's declaration, and is intelligible: want of form does not vitiate.

But the court erred in sustaining the demurrer to the third plea of the security. This was intended to be a plea denying that assets had come to the hands of the administrator. It is confused, and unskilfully drawn; but being intelligible, its informality should not be fatal to it, when it is tested by the liberal rules of practice, which have long since prevailed in Kentucky.

Whether a security for an executor or administrator can plead no assets or *plene administravit*, after a *devastavit* fixed on the principal by judgment, is, as far as we know, a new question in Kentucky. We have not seen any direct decision on this point; but we have no doubt, that the security is not estopped by the *devastavit* on the principal.

Devastavit fixed upon the principal estops him from pleading no assets. The object of the suit to establish waste of assets, and to charge him personally.

By the tenor of the bond, and on principles of reason and of common law, the liability of the principal and his security on their joint bond, would be co-extensive and commensurable. And if there had been no statutory enactment on this subject, there could be no doubt that a judgment for a *devastavit* against the principal would, as to assets conclude the security. It certainly is conclusive on the principal, and estops him from afterwards denying assets; for the only object of the suit suggesting a *devastavit*, is to ascertain and establish the fact of a waste of assets; and therefore whenever a judgment for *devastavit* is rendered against an executor or administrator, he can never be relieved, by averring and proving no assets or full administration. If he could, suits against him, to enforce his personal liability, might be interminable. For if one judgment, fixing a *devastavit* would not bind him, and convict him of waste, no greater number of judgments could deprive him of right to relief for want of assets. Hence, after a judgment establishing a *devastavit*, he cannot escape individual responsibility. The action of debt suggesting a *devastavit*, is brought against the executor or administrator, not in his representative character, but in his own right, and the judgment is conclusive against him; Worsham vs. M'Kensie; 1 Henning and Munford, 342.

To maintain an action

Before a creditor can maintain a suit against an executor or administrator for a *devastavit*, his debt must be ascertained by judgment, and the delinquency of

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the fiduciary, shewn by a return of "*nulla bona.*" Without such judgment and return, it cannot appear that the personal representative has rendered himself personally liable. After such return of "*nulla bona,*" he could not deny assets, until he was permitted to do so by an act of 1811. This act provides, that "in all suits against them (executors or administrators) on their bonds or otherwise *for devastavits*" they may plead no assets, &c.

against ex'r or adm'r for *devastavit*, the demand must be ascertained by judgment, and delinquency shown by return of *nulla bona*.

Before the passage of this act, executors and administrators were responsible, *de bonis propriis*" on the return of *nulla bona* on an execution on the first judgment of the creditor.

Practice in England.

In England the execution on this first judgment of a creditor, was "*a scire facias, de bonis testatoris, &c., et si non, de bonis propriis;*" on which the sheriff might return either "*nulla bona*" or "*devastavit.*" On the former return, the creditor proceeded by a *scire fieri* enquiry, or action of debt, suggesting a *devastavit;* on the latter he might have "*a fieri facias, de bonis propriis,*" and it was immaterial whether there were assets or not.

Practice in Kentucky, prior to the act of 1811.

The practice in this country, had been, to bring an action of debt, with suggestion of waste, on the return of "*nulla bona;*" and in such action, the defendant was not allowed to avail himself of a plea of no assets, or *plene administravit.*

Effect of the act of 1811.

The act of 1811, however, gives an executor or administrator the right to be exempted from liability, by filing an appropriate plea to the action brought "*for a devastavit,*" on his bond or otherwise." But it gives him no further indulgence. It effects no other modification of the ancient doctrine which has been mentioned. It does not reserve to an executor or administrator, any right, after a *devastavit* fixed by suit, to exhonerate himself by plea of no assets. Neither the executor nor his security, can call in question the effect of a judgment by a creditor against the executor, establishing a debt. Nor could the security, on principle, or by analogy, have any more right than the principal, after a judgment for a *devastavit* against the latter, to deny the assets. Because, by his bond, he is

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bound for the acts of the principal, co-extensively with his liability, and could not deny that there were assets, when his principal, by having virtually admitted them, had lost the right to gainsay their existence and sufficiency.

The act of 1797, places securities upon a different ground from their principals.

But by the third section of the act of 1797, it is provided, in substance, that the securities of administrators and executors, shall not be made responsible beyond the amount of assets, by reason of any omission, default, or mispleading, &c. of their principals.

This act is plain, and decisive. It cannot be misunderstood. It was framed for the purpose of relieving securities, from the extreme rigor of the former doctrine of the law, and of placing them, as it was right to place them, on ground different from that which their principals, by their delinquencies, might be forced to occupy. Although the principals were still personally liable, on a return of "*nulla bona*, the securities were relieved from responsibility, to any greater extent than the amount of assets received and retained, or wasted. In a suit then, on the official bond, against an executor and his securities, for a *devastavit*, the latter could escape by shewing no assets, or a faithful administration of them, while the former was doomed to individual liability, before 1811, whether there were assets or not. Since 1811, in a suit on the bond, for a *devastavit*, both the principal and his securities may be protected, by shewing that there were no assets.

After a *devastavit* fixed upon principal, the securities in an administration bond may plead no assets; tho' the principal cannot.

But a suit may be brought for a *devastavit*, either on the bond or without it. And an action of debt, suggesting a *devastavit*, is usually brought against the principal alone, without noticing his bond. Such was the course in this case. By the judgment fixing a *devastavit* in such a suit, the defendant is concluded, as to the question of assets; and if a suit be afterwards (as was done in this case) instituted on the bond, against the principal and securities, the latter can certainly avail themselves of the third section of the act of 1797, and plead no assets, or *plene administravit*, as the case may be.

They have a right to make this defence whenever they are sued; and this right cannot be destroyed or impaired, by the fraud or negligence of the principal,

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in omitting to plead, or on mispleading. Such a delinquency by the principal, is the reason and only one, why the statute has extended the protecting privilege to the security. Whatever may be the condition of the principal therefore, or whatever he may have done or omitted to do, his security, whenever sued on his bond, may shield himself by shewing, either that there had been no assets, or that they had been fully administered. If he have not this right, the third section of the act of 1797, is a nullity, and can have no operation. To give it a practical and beneficial effect, it must be construed to extend to the security, this right; a right which his principal had not, after a return of "*nulla bona*," until 1811, and has not even now, after a judgment fixing a *devastavit*. Without the acts of 1811 and 1797, both the principal and his security would be concluded by a return of "*nulla bona*." By the act of 1811, the principal is protected, until after a judgment fixing a *devastavit* on him, but is concluded by such a judgment. By the act of 1797, the security is never estopped, until after a judgment shall be obtained against *him*.

When he is sued on his bond, he may plead under the third section of the act of 1797, although a *devastavit* may have been established on the principal, by a judgment.

By the act of 1797, the security is protected from the effects of a *devastavit*.

That the security cannot be concluded by a *devastavit* fixed on his principal, must be the effect, and the only one contemplated by the third section of the act of 1797, and should be considered indisputable. And this is clearly intimated, by a recent opinion of the late judges of this court. But that opinion, (written by the late judge Bibb,) asserts, as before stated, that two judgments against the principal, one establishing the debt of a creditor, and the other fixing a *devastavit* on the representative, are indispensable to the maintenance of a suit against the security.

The principle affirmed in the case of Clark vs Hendly, 5 Mon. 99, overruled. To maintain an

It may not be necessary that we should, in this case, review this opinion. But as we believe, after a careful examination of it, that it cannot be sustained, if sustainable at all, on any other hypothesis, than that the judgment for a *devastavit* against the principal, is like that ascertaining the creditor's debt, conclusive on

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the security; although the opinion itself, intimates the contrary; we therefore suppose, that it is proper that we should offer some reasons for our dissent from the main doctrine contained in it, and for our concurrence with the assistent judge (Mills.)

action against the sureties in an administration bond, it is not necessary there should be a judgment of *devastavit* against the principal.

Whether two judgments against the principal, must be obtained before his security can be sued, had remained undecided in Kentucky, until the opinion, drawn by judge Bibb, was delivered. This opinion seems to have resulted solely from an acquiesence in the supposed authority of some Virginia cases. The principal cases relied on, are Braxton vs. Winslow, 1 Washington, 31, and Gordon's administrators vs. the Frederick Justices, 1 Munford, 1.

The cases Branton vs. Winston; 1 Wash. 31; & Gordon vs. Frederick Justices; 1 Manford; & the case of Clark vs. Hendly, 5 Monroe, 99 criticised: the opinion of judge Mills, the dissentant judge, sustained.

The case in Washington, is the first which can be found on this subject. The opinion in that case, was delivered by judge Pendleton, who, after deciding the only point, which he had a right to adjudicate on, to-wit: Whether a creditor could maintain a suit on the official bond, against the principal and securities, before his demand had been ascertained, by a judgment against the principal, proceeded to state extra judicially, that the securities not only could not be subjected to suit, before one judgment against their principal, but that a second judgment for a *devastavit* was necessary, to fix their liability. The authority of this *obiter dictum*, was questioned in Virginia, for many years. Some of the ablest members of the Virginia bar, denounced it as irrational and absurd; and it never was definitively recognized until 1810, when it was sealed with the authority of the case of Gordon vs. the Frederick Justices. The opinion in this last case, is evidently an inconsiderate acquiescence in the suggestion of Pendleton, and is not so much a deduction of reason, as it is an unreflecting homage, to the memory of a venerated jurist. No satisfactory reason is given, by either judge Pendleton or his successors, in 1810, for the doctrine which, *on their authority*, judges Bibb and Owsley have sustained. Although we feel great respect for the pre-eminent attainments which crowned judge Pendleton with the first legal honors of his day, we cannot admit that this hasty *dictamen* of his, is entitled to the force of controlling authority, when it

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is sustained by no known principle of law, and is inconsistent (as it seems to us) with all analogy and all reason. Nor can the subsequent recognitions by the court of appeals of Virginia, and a majority of that of Kentucky, in the cases before mentioned, enforce on us, against our own unwavering convictions, this extraordinary doctrine; for they are but the echoes of Pendleton's opinion, and extorted by the authority of his name.

The opinion dissented from, by judge Mills, ought not therefore, under all the circumstances, to be decisively authoritative; and concurring with him as we do, that this opinion does not give the true exposition of the law, or the reason of the law, we do not hesitate to declare our own sentiments. In doing this, we shall not be much embarrassed by the maxim "*stare decisis et non quieta movere.*" For we do not consider it as applicable to such a question, as that now under consideration, and to such decisions as those which have been rendered upon it.

The object of an admr's. or exr's. bond, and the nature of the undertaking of the sureties and where liable.

The bond of an administrator is intended to secure a faithful and legal administration, for the benefit of creditors and distributees; and the securities, among other things, undertake jointly with the administrator, that he shall well and truly administer the chattels, &c. according to law, and that after paying all just debts, he shall distribute the residuum among those who shall be entitled to it. Whenever it is ascertained that the administrator has failed to fulfil this undertaking, the condition of the bond is forfeited, and he and his securities are liable to suit. This is ascertained in the case of a creditor, as soon as an execution on a judgment in his favor, for debt due by the intestate, shall have been returned "*nulla bona.*" Such judgment and return are necessary, because the administrator is not bound to pay the creditor, until his debt has been established by judgment, and cannot be charged with default, until an execution has issued against the estate of the intestate, and he has failed to appropriate the assets to its satisfaction. But whenever he fails or refuses to satisfy the execution, he is certainly *ipso facto* guilty of a breach of his official bond, and may be proceeded against personally. And

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it seems to us a self-evident proposition, that whenever the administrator may be sued in his individual character, that suit can be brought on his bond. This is expressly maintained by the Virginia cases, and particularly that of "the Amelia Justices vs. Brooking," 3 Munford, 549. There is no room left for doubt on this point, when the act of 1811 is examined. Judge Bibb has inadvertantly misquoted this act, when he uses the phrase "*in any suit on his bond, or for a devastavit.*" The expressions of the act are "in all suits against executors, &c. *on their bonds* or otherwise, *for devastavits, &c.*" This difference between the act and the misquotation from it, by judge Bibb, is very material, and of itself, should be sufficient to show that the opinion drawn by him, is indefensible. Without the expressions erroneously quoted by him, it seems to us that the opinion would never have been rendered. It evidently presupposes that the suit for a *devastavit*, which it requires against the administrator, cannot be brought on his bond; and that the bond is never forfeited before a *devastavit* fixed by judgment on the administrator. And this error could have resulted only from the radical mistake which was made in copying the extract from the act of 1811.

An ex'r. or adm'r. may be sued for a *devastavit*, on his official bond.

But the tenor of the official bond, all the analogies that can be imagined, the express letter of the statute and the authority of the Virginia court of appeals, undeniably prove, that an administrator or executor, may be sued for a *devastavit* on his bond.

A question then arises, which must be decisive. It is this: Whenever the principal, in a joint and several bond, is liable to suit upon it, are not his securities in the same bond, also liable? We think they are.

When the principal in a joint and several obligation is liable to be sued, al his securities are.

If there have been no forfeiture of the condition, the principal is not subject to suit on his bond. The instant there has been a forfeiture of the conditions, the securities are liable. The obligation of all the obligors is precisely the same; their contract is the same; their responsibility is equal, and occurs at the same time, and co-exists until all of them are released. A joint bond, on which one of the obligors might be sued, and the others could not be, would be a nondescript unknown to the law, and never yet seen or

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heard of. No obligor can be sued on his bond, until there has been a breach of it; and whenever there is a breach, all the joint obligors are responsible.

The very object of requiring security in a bond of any kind, is to render them liable with the principal, and to the same extent, as that to which he is bound. For a breach of a joint and several obligation, suit may be brought either against all the obligors, or *any* one of them. The principal obligors may be sued alone, or either of the securities may be alone sued, or all the obligors may be sued. No one of them is liable to suit, sooner than another; and all of them are liable for the same reason, and at the same instant. Why is the principal subject to suit on his bond? Because there has been a breach of the bond. For what are his securities responsible? A breach of the bond by the principal. When are they liable? Whenever the breach occurs. The principal cannot be sued before a breach. If, therefore, (as is beyond a doubt) an administrator or executor, can be sued on his official bond, as soon as "*nulla bona*" shall have been returned on an execution against him, his securities may be made defendants to the same action. If there be any right of action on the bond, it must be entire, and will be legal, unless the legal remedy, by accident, is rendered ineffectual.

In the cases of Taliaferro, &c. vs. Gaines, reported by Call; Clark vs. Webb, &c. 2 H. and Md., 9, and Spotswood vs. Dandridge, &c., 4 Munford, 289, it is decided, that a suit in chancery may be maintained against an executor and his securities, on their bond, before a *devastavit* is fixed on the executor by judgment. As the obligation of the bond is purely legal, we are at a loss to perceive why a suit at law, may not be brought on it, as soon as any liability attaches to it. A bill would lie on the bond, only on the supposition, that there had been a breach by the executor; and surely for this, an action at law can be brought against him and his securities. The principle of these decisions is irreconcilable with the *dictum*, in Braxton vs. Winslow.

Perhaps we have said too much already on this subject. It is (in our opinion) one of those propositions

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which are intrinsically so plain, as to render argument unnecessary for their elucidation. But the opinions to which we have referred, require further notice.

We have been unable to discover any good reason for requiring two judgments against an administrator or executor, before a suit can be brought against his securities. Such a requisition is not made in any other class of analogous cases. The terms of the official bond do not exact it; the statute does not countenance it, and it is not justified by any principle of justice or policy. It would lead to many absurdities and inconveniences, and would produce delays, and a circuity and expense, inconsistent with private right and the genius of our jurisprudence.

The judgment establishing *devastavit* against the adm'r. or ex'r. does not conclude the securities; they can still plead no assets, or *plene administravit*.

It is evident, that the second judgment against the principal, establishing a *devastavit*, cannot be used against his securities as evidence of a waste of assets. They may still plead no assets, or *plene administravit*. The only reason intimated by judge Pendleton, for requiring the second judgment against the principal, seems to be, as far as any reason can be inferred, that the securities are not responsible, until there has been a *devastavit* judicially ascertained against their principal, because until then, there is no sufficient proof of his delinquency: and consequently, that when so ascertained, it shall, like the first judgment for the debt, be conclusive on the securities, as well as the principal. If it shall not have this effect, it can have none on the securities, and therefore as to them, is immaterial. There is no semblance of plausibility in the doctrine which requires the second judgment against the principal, unless that judgment, when obtained, shall be proof against the securities, of a waste of assets by the principal. For if, notwithstanding such second judgment, which is conclusive on the principal, the securities may controvert it, and escape by proof of its falsehood, it has no effect except on the principal; and therefore, can neither create, nor prove the liability of the securities, and consequently cannot be necessary for the institution or maintenance of a suit against them. As it is a general rule, that whatever concludes the principal, is equally effective on his security, the judgment for a *devastavit* against the principal, as it estops

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him from denying assets, would have the same effect on the security, if the third section of the act of 1797, had not been enacted. But even then, we cannot perceive any sufficient reason why, although the second judgment against the principal, would be conclusive also on the security, it should be necessary that two judgments should be rendered against the former, for the purpose of binding the latter, without giving him the right of defence, by making him a defendant; such a doctrine would virtually disfranchise securities. For if the second judgment against their principal be necessary as evidence against them of his *devastavit*, that judgment must of course be conclusive against them; and thus they would be bound by the fraud or negligence of their principal, without an opportunity to resist the effect of a judgment against him, which, when obtained, binds them, and cannot be controverted by them.

The Virginia decisions on this question never could have been rendered, (as is manifest by an inspection of them) unless it had been supposed that the judgment fixing a *devastavit* on the principal, would be conclusive against the securities. And it would be so, without the 3d section of the act of 1797.

Effect of 3d section of the act of 1797; Lit. Statutes.

Those who have adopted the *dictum* in Braxton vs. Winslow, cannot have noticed or sufficiently considered the language and effect of this section. Since this enactment, no number of judgments against the principal, can be evidence against the security, when he shall be sued; and he may under any circumstances exhonerate himself, by pleading and shewing whenever he may be sued, a want of assets. The return of "*nulla bona*" on the executor, on the first judgment of the creditor, is as much evidence against the security of a *devastavit* by the principal, as the second or any greater number of judgments can ever be.

Operation of the return of *nulla bona*, influenced & controled by the statutes of 1797 and 1811. It

The law requires executors and administrators to pay the debts. One of the conditions of their bond is, that they will, well and truly administer the goods &c. according to law. A failure to pay a debt when properly ascertained and authenticated, by a judgment, and demanded by an execution, is a breach of this

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HOBBS AND CHURCHILL vs. MIDDLETON.

is such evidence of breach of conditions of the bond, as entitles a creditor to an action on the bond, against principal and securities, or against any one of them.

condition. This is now not controverted, so far as we know or believe, in England or America. The return of "*nulla bona*" before our statute of 1811, was conclusive evidence against the executor or administrator of a *devastavit*, and without that of 1797, would have been equally effectual on his securities. He may now escape the effect of such return, by shewing a full administration, at any time before a judgment for a *devastavit*, and his securities may save themselves by such plea, in any suit against them, whenever or however brought. But surely these statutory indulgencies, cannot have the magic effect of preventing a creditor from sueing on the official bond, on the return of no property. This return is still *prima facie* evidence of a breach of the condition, "well and truly to administer according to law," and authorizes a proceeding against the principal, and consequently his securities on their bond. If, because it is not incontrovertible evidence of a *devastavit*, it would not justify a suit on the bond against the securities; such suit can never be brought against them, because no judgment whatever, against the principal, can be conclusive evidence against the securities.

It is admitted by the Virginia cases, that "*nulla bona*," is evidence of a *devastavit*; but they insist, that it is not sufficient evidence against the security. What then will be sufficient evidence? Not a second judgment against the principal. The return is as much evidence against the securities as it can be against the principal; and will authorize a suit against them all, on their bond, for it is evidence of a breach, until the contrary be shewn. And such is the law as settled by the supreme court of New York, in 'the People vs. Dunlap; 13 Johnson, 441.' The condition of the bonds of executors and administrators in New York, so far as creditors are concerned, is precisely the same, as that contained in the bonds in Virginia and Kentucky; nevertheless, the court of New York, seem to consider it perfectly clear, that on the return of "*nulla bona*," a suit may be brought on the official bond, against the principal and his securities. We cannot believe that this could ever have been questioned, if judge Pendleton, had never made, the hasty obiter suggestion in Braxton, vs. Winslow.

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The opinion written by judge Bibb, seems to admit that the security cannot be prejudiced by a judgment for a *devastavit* against his principal, while it adopts the *dictum* of Pendleton, which this admission strips of all semblance of reason.

If the creditor mean to sue the securities, or if the insolvency of the principal shall shew, that the debt must be eventually made out of them, why should the second suit be prosecuted against the insolvent principal alone? It can have no effect on him; it can have none whatsoever on the securities. Why shall the creditor be unnecessarily postponed? Why shall he be compelled to prosecute a suit which can have no practical effect, and produce no possible benefit to him, or to others.

The absurdities resulting from the contrary doctrine

After two unavailing judgments against the principal, one against the assets and the other against his own estate, it certainly could not be necessary to sue him again. If the second suit be brought, as it may be, on the official bond, no further suit could be maintained on it against the principal. He could plead the former judgment on it. Then could the creditor sue all the securities, if there are more than one? or must he, as it is a joint and several bond, sue only one at a time. He cannot bring a joint action against all the obligors, because the former judgment against the principal, would absolve him from any further suit on his bond. This is our opinion; but it is not necessary to decide this point definitively.

The doctrine which we have been combatting, might in practice, lead to the strange consequence, of compelling a creditor to bring separate successive suits on a joint obligation, executed for his benefit by several; or it would at least present the phenomenon, of one defendant, being precluded from making any defence to a joint action, to which action, all the others may plead successfully. For the administrator, in his third suit, could not deny assets; and his securities, it being their first, certainly could. If therefore, he never had assets, or had fully administered, a judgment for the third time must be rendered against him, and no judgment at all can ever be obtained against his securities, if they make proper defence.

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Many other absurdities may result from a doctrine, attempted to be established "*jurare magistri*," without any consistent reason, contrary to the decisions of other states, and against every analogy of the law which can be shewn in the world.

These incongruities and perplexities, can all be avoided by suffering the creditor, as soon as his execution on his first judgment shall be returned "*nulla bona*," to sue the administrator, and his securities on their bond, either jointly or severally, as he may choose to do. And this we feel very sure is his right. No law has taken it from him; there is no reason for making such a case an exception from all others that ever existed, or can be imagined: and there is nothing which gives countenance to such unreasonable exception, but the judicial legislation of judge Pendleton. This at least is our opinion, and we must act according to it.

Conclusion of the court and judgment.

The principal views which we have taken of this subject, are such as judge Mills, in his dissent did not deem necessary, to sustain his argument. That argument is very cogent. But if we were uninstructed by *it*, the considerations which we have suggested, would be satisfactory to us. It was not necessary, that we should recapitulate all the arguments, already published by another.

We therefore feel constrained to disagree with judges Bibb and Owsly, and to decide that two judgments against an administrator or executor, are not necessary, before a suit can be brought against him and his securities, on the official bond. And it seems to us, that although three suits may be brought, only two, would be much better. But whatever may be the true doctrine, on this subject, we have no doubt, that the security *when sued*, can plead no assets, or *plene administravit*, and is not concluded by any number of judgments against his principal.

For sustaining the demurrer to the third plea of the security, therefore, in this case, the judgment is reversed, and the cause remanded for further proceedings, consistent with this opinion.

Denny, for plaintiff; *Crittenden*, for defendant.

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Freeman and Ewell vs. *Patton.*

MOTION.

Writ of error to the KNOX circuit; JOSEPH EVE, Judge. Case 43.

Execution. Replevy bond. Appeal.

Judge ROBERTSON delivered the opinion of the Court. April 13.

THE only point made in this case, which is entitled to any consideration, is, whether an execution and replevin bond, be quashable, because the execution issued before the expiration of twenty days, allowed for an appeal bond to be given, in an appeal granted, to the judgment on which the execution emanated? No decision has ever been given directly on this subject. And we must therefore dispose of it according to what we consider the reason of the case. Question stated.

Although it is unreasonable to issue an execution on a judgment, from which an appeal has been prayed, until it shall have been ascertained, that it is not to be prosecuted, it would not be erroneous to do so. Generally it is prudent not to do it; because, if the appeal shall take effect by the execution of bond, the execution would thereby be suspended at the cost of the creditors. Not error to issue an execution within the time given to execute an appeal bond.

But praying an appeal, does not *ipso facto*, suspend the judgment or prevent any proceeding for its enforcement. Granting an injunction or condition that bond and security shall be given, does not enjoin the judgment, and execution may issue on it, until the injunction shall take effect by the execution of the bond. The analogy seems to be strong between the two classes of cases. Granting an appeal does not, *ipso facto*, suspend a judgment or decree; executing the bond does.

If the appellant or complainant in the injunction, desire to prevent an execution, he may do so, by promptly giving the bond required. Whenever he shall do this, the opposite party is restrained. But if he supinely delay, he cannot complain that his adversary has by greater vigilance attended to his interest, and chosen to run the hazard of paying cost on process that may at any moment be arrested.

In this case, the appeal has never been taken. It was prayed; and allowed on condition that bond should be given in twenty days. By giving the bond, the appeal would "*ex instanti*," and not before, be effectual. Optional with the party praying an appeal, to execute bond or

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CLARK, &c. vs. YATES, &c.

abandon his appeal.

It was optional with the party praying it, to give it effect or not. He has chosen to abandon it, and to replevy the judgment for two years. He should not now be permitted to profit by his own delinquency, and postpone and harrass his creditor. If he were sustained in this attempt, artifice and unjust delays would be encouraged.

If however the law were in his favor, we should be compelled so to decide. But believing that it is not, we, with the more confidence, decide against him, because such a decision accords with justice and sound policy.

The other errors assigned, contain no good objection to the decision of the court below, and are obviously not sustainable.

Wherefore, the judgment of the circuit court is affirmed.

Triplett, for plaintiff; *Wickliffe*, for defendant.

CHANCERY.

Clark, &c. vs. Yates, &c.

Case 44.

Error to the Adair circuit; BENJAMIN MONROE, Judge.

Chancery. Will. Execution. Parties.

April 13.

Judge ROBERTSON delivered the opinion of the Court.

Bill of complainants.

THE defendants in error filed their bill in chancery, as heirs of William Clark deceased, against the plaintiffs in error, also, heirs of said Clark, to set aside a will, purporting to be the last testament of their ancestor, and which had been admitted to record in the county court of Adair.

Executor a proper party, but neither served with process nor appearing.

Pascal D. Craddock, who was qualified as the executor of the will, was prayed to be made a defendant; but process was never served on him, and he did not enter his appearance.

Decree of court below.

The court decreed in favor of the defendants in error, and declared the will invalid, for want of a disposing mind by the testator.

Decree pronounced erroneous.

The decree was premature and irregular. The executor was a necessary party. He was not made a party, and consequently the decree, for this cause is erroneous.

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Wherefore the decree is reversed, and the cause remanded, with instructions for such further proceedings as may be necessary to prepare the case for a final and valid decree, and as the executor has appeared in this court, it will be unnecessary to serve him with process. TALBOT vs. MILLER, &c.

Crittenden, for plaintiff; *Monroe*, for defendant.

Talbot vs. Miller, &c.

EJECTMENT.

Appeal from the Oldham Circuit; HENRY DAVIDGE, Judge. Case 45.

Ejectment. Evidence. Bill of exceptions. Presumption. Practice. New trial.

Judge UNDERWOOD delivered the opinion of the Court.

April 13.

Statement of the case.

THE appellees instituted an action of ejectment in the Oldham circuit court, against the appellant, and recovered. The appellant moved for a new trial in January, the court took time to consider, and in April following, overruled the motion. The appellant filed a bill of exceptions to the opinion of the court overruling the motion, in which it is stated, that the evidence given on the trial, is not certified, because the court did not remember it. The bill of exceptions also complains of the proceedings of the court, at the previous term, and the refusal of the court to certify the evidence, because of forgetfulness on the part of the judge.

The court cannot reverse judgment unless error appear in the record.

It is impossible for us to say, that the court erred in overruling a motion for a new trial, when the record presents for examination, nothing but the declaration, verdict and judgment. Whether the evidence did or did not authorize the verdict; we cannot tell, as it is not before us.

Where no evidence certified, the presumption in favor of the courts having jurisdiction.

The presumption is in favor of the legality of the proceedings of the court, and the party complaining of those proceedings, must shew to this court, the facts necessary to enable this court to detect the error, if any exists. The judge who presided on the trial of the cause, is not now in office, and if he were, it would require superhuman power, to bring to his recollec-

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Burris, &c. vs. Johnson.

tion, the evidence which he has forgotten, so that he may yet certify it to this court. We can prescribe no remedy for such a case. To direct a new trial for the purpose of enabling the party, to spread the evidence on record, hereafter, when in such trial, the evidence might be essentially different, would not be a revision of the proceedings already had, but would be ordering new proceedings, with a view to revise them if erroneous. Such a course would be alike novel and illegal.

Rule of practice proposed and advised.

We would suggest, as a matter of practice, that it is most proper, always to take down the evidence during the term, at which a cause is tried, where the court takes time, until the next term, to consider a motion for a new trial. If this is not done, and the court will not certify what the evidence was, and the party aggrieved, has not procured the bystanders to certify it as required by law, this court cannot reverse the case, because of the possibility of error, which does not appear.

Judgment affirmed. The appellees must recover their costs.

Denny, for appellant.

Trespass.

Case 46.

Burris, &c. vs. Johnson.

Error to the Meade Circuit: Henry Pirtle, Judge.

Trespass. Accession. Instructions. Judgment.

April 14.

Judge Robertson delivered the opinion of the Court.

The question stated.

If A, enter on the land of B, and cut down his timber, without his consent, and construct out of it, the frame of a flat-bottomed boat, is B liable to an action of trespass for taking and converting the timbers thus constructed?

This question must be decided in the negative.

How specific qualities and distinctions of any material.

The transformation of the timber, into a new shape, does not change the specific character or qualities of the native material. It is still wood, *exclusively* wood, and the same wood which was attached to the freehold, in the form of growing trees. And while the original

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distinctive qualities can be identified, no expenditure of skill, or labor, or money, in the alteration of the form of the timber, by a trespasser, can divest the owner of the trees of his right to the wood, into whatever shape, or for whatever purpose, it may have been changed, without accession of other materials, or of value beyond what accrued in this case.

remain unchanged, a trespasser, by the modification of the form of such *material*, knowing it not to be his, cannot divest the original owner of his right of property; nor can he maintain an action against such owner for taking the material in its modified condition.

Nor could *any* transmutation of the timber, by the wantonness of another, knowing that the thing did not belong to him, vest him with a right to the product, without the original owner's consent, and against his claim. Therefore, in this case, it follows, that no trespass was committed in taking a boat frame, the timber of which belonged to the taker, and was cut down without his consent, by one who knew that he had no right to it.

This is the doctrine of both the common and the civil law; Blackstone's Com. 404; Year Books, 12, H. VIII; 19 Bro. title property, 23; 5 Johnson's Reports, 349; Cooper's Justinian 75–6; 1 Brown's Civil Law, 240.

These authorities are full and explicit on this subject, and clearly sustain this opinion.

By the common law, as reported in the year books, leather made into shoes, cloth into clothes, or timber into plank or blocks, without the consent of the owner of the material, belongs to him in its modified form.

In 5 Johnson, it is decided, that shingles belong, in like manner, and under the like circumstances, to the owner of the timber.

Such is also the doctrine of Brown and Justinian, and Vinnius; and Brown lays down the further principle, that *no* accession to, or alteration of, a thing, by one knowing that it is not his, can divest the owner of his right to it.

It is evident, therefore, that the law of "specification" or "accession," or "accretion," cannot apply to this case. The timber was only hewed or sawed into pieces and put together so as to form the frame of a boat, and this was done with the perfect knowledge that the trees belonged to another, without whose consent they had been used.

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This suit was brought for some plank, as well as the frame. And it is true that it has not been shewn where or out of what timber the plank was sawed.

But as the court erred in instructing the jury that the plaintiff below had a right to recover for the frame, if it had been "constructed," the judgment must, as it is entire and inclusive, be reversed, and the cause remanded for new proceedings, consistent with this opinion.

Brown, for plaintiffs; *Semple*, for defendants.

Jarman vs. Daniel.

Error to the Madison circuit; GEORGE SHANNON, Judge.

Plea. Bill in Chancery. Decree. Bar. Publication. Demurrer.

Judge ROBERTSON delivered the opinion of the Court.

To an action on the case, for deceit in the sale of a horse, brought by Jarman against Daniel, the latter plead in bar, a former decree dismissing a bill in chancery, exhibited by Jarman against Daniel and Field and M'Clanahan his assignees, to enjoin the payment of the note given for the horse, and assigned to Field and M'Clanahan, for the fraud alleged to be committed in the sale of the horse.

To this plea, Jarman replied that the suit in chancery being for a recision of the contract, the bill was dismissed because the horse was retained by him, and had not been offered in a reasonable time to Daniel.

A demurrer to this replication was sustained, and judgment rendered for Daniel.

We are inclined to think that the plea is defective. Its averments do not necessarily or by fair construction, show such facts as can enable the court to decide, on the face of the plea, that the decree should bar the suit at law.

If the bill was filed to rescind the contract, (as we suppose was the case,) and dismissed as it ought to have been, because Jarman had not offered to return

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the bond, the decree could not operate as a bar to a suit for damages for the fraud. The record of this suit in chancery is not made a part of this record; but was omitted by the agreement of the parties. Without the record of the chancery suit, the plea cannot be sustained. For it is most probable that the bill was filed for a recision and was dismissed, for the reason assigned in the replication. The plea does not aver any thing inconsistent with this idea. We cannot place any other construction on the plea, unless we were compelled to do so, by the exhibition of a different state of case by the record. JARMAN vs. DANIEL.

If the bill was filed for the purpose of setting off the damages for the fraud, it could not have been sustained, and a dismission would not bar a suit for the deceit, but only render it the more necessary.

Unless the record had been exhibited, and had shown, (which is not to be presumed,) that the fraud was fully tried in the suit in chancery, we must infer that the suit was not tried on the merits, and did not present such a case as to admit a decision on the fact of fraud or no fraud.

The replication, if true, avoids the effect of the plea, even if it contain, as it does not, allegations sufficient to bar the action. As the parties have dispensed with the record of the suit in chancery, by their agreement, we must consider the demurrer to the replication, as admitting its averments. We cannot say that they contradict or are intended to supply the record. It is probable and almost certain, that the replication corresponds with the record; and there is nothing in the plea which would indicate the contrary.

On these facts, we must decide that the demurrer was improperly sustained.

Wherefore, the judgment is reversed and the cause remanded, for proceedings consistent with this opinion.

The defendant should have leave to plead over, so as to enable him to present the decree in such a manner, as to make the record of the chancery suit, directly and exclusively, the test of the question, whether

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BLISS vs. BRANHAM.

the dismission of the bill is, according to established principles, a bar to this suit.

If the charge of fraud was fully and properly tried in the suit in chancery, it cannot be again litigated. If it was not, or could not be tried, it may be tried in this suit. The record can alone determine this question.

Turner, for plaintiff; *Caperton* and *Breck*, for defendant.

PETITION & SUMMONS.

Bliss vs. Branham.

Case 48.

Appeal from the Jefferson Circuit; HENRY PIRTLE, Judge.

Defeasance. Pleading. Payment. Uniting causes of action. Petition and summons.

April 14.

Judge ROBERTSON, delivered the opinion of the Court.

Nature of transaction between pl'tff and def't. the pleadings; evidence; judgment of the court below.

BLISS executed to Branham two notes for $500 each; and at the same time, Branham delivered to Bliss a writing, stating that the notes might be discharged in Commonwealth's paper, at a discount of $180 in paper for $100 in specie. To a petition and summons brought by Branham, on both of these notes, Bliss plead the writing given to him, and a payment of the amount in Commonwealth's paper, according to its tenor. Issue was joined on the payment, and there being no evidence except the notes and the writing plead by Bliss, the jury found a verdict for the full amount of the notes, in specie, and the court gave judgment accordingly.

Instructions moved by defendant and refused.

Bliss moved the court, in the progress of the case, to instruct the jury that they could not find more than the amount of the notes, at the rate of exchange stipulated in the said writing; which was refused; and the principal question now is, was the instruction proper?

A executes two notes to B, for $500 each; B, at the same time, gives to

There is no doubt that Bliss had a right to discharge his notes by paying the amount agreed upon in the writing plead by him. But he did not pay that amount or any part of it. If that writing be a defeasance or a condition, by pleading it as such and proving a compliance with it, Bliss would have been entitled to a

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verdict. But on the issue and proof in the case, he could not be entitled to the benefit of the condition, unless the disclosure of its existence should have non-suited the plaintiff. The plaintiff, if he recover at all, must do so according to the contract sued on. And Bliss could avail himself of his writing in only one of two ways. First, by a payment according to that writing. Or, second, by relying on it as evidence, that the contract sued on was not the actual one between the parties. The issue being that of payment, when there was no proof of payment, the plaintiff had a right to recover, and if so, could recover legally, and according to the contract sued on, nothing more nor less than the amount of the notes due on their face. The instruction, therefore, was correct; unless the exhibition and admission by the replication, of the writing plead, entitled the defendant to a non-suit. This is the only point, on which we have had any difficulty. The contract was certainly one, virtually, for paper; and as much so as if the condition or defeasance had been incorporated in the notes. But ought the plaintiff to have declared on it as such? We think not. He had a right to declare on the notes according to their legal effect, without the other writing. A plaintiff is not bound to aver or notice in his declaration, a condition to a penal bond. This is matter of defence for the defendant, and if the condition has not been performed, equity may relieve the defendant from the penalty.

A, a writing, stating that A may discharge his notes in depreciated paper, at the rate of 180 paper dollars, for $100. B sues, uniting both notes in one petition and summons. A pleads the defeasance, & payment according to its tenor; but fails to establish his plea. B obtains judgment for the amount of the two notes. Adjudged, there was no error in the record.

Whether the same relief could be given in chancery, to Bliss, in this case, it is not necessary or proper that we should decide. The solution of this question, however, will depend on another, and that is, whether the writing plead, shall be construed as a condition, to the benefit of which Bliss was to be entitled, *only* in the event of punctual performance of it; or whether that writing and the notes should be considered as an entierty, as much as if they had been included in the same writing; and in that event, whether the legal effect would be that Bliss was in no event, and at no time, to be bound for the whole amount of the notes in specie.

All we can decide now, is, that on the issue and the proof, the instructions, verdict and judgment were correct.

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BAIN vs. WILSON.

We know no reason why a petition and summons may not be brought on two or more notes for money, as well as an action of debt. It would, indeed, be well if the practice could become more general. It would save much in fees, &c.

There is, therefore, no error in the record, and consequently the judgment of the circuit court is affirmed.

Crittenden, for appellants; *Richardson* and *Depew*, for appellee.

ASSUMPSIT.

Bain vs. Wilson.

Case 49.

Error to the KNOX Circuit; JOSEPH EVE, Judge,

Paper Currency. Money. Demand. Tender. Obligor. Obligee.

April 14.

Judge ROBERTSON, delivered the opinion of the Court.

Statement of the contract between the parties.

BAIN having loaned to Wilson $100, in notes of the Bank of the Commonwealth, Wilson, in 1822, promised to procure for him, at prime cost, a wagon, to be made in Tennessee. Afterwards, (but when, is not proved,) Wilson brought a wagon from Tennessee, which, he told Bain, cost $175 in Commonwealth's paper. Bain took it, at that price, and afterwards sold it.

Foundation of the suit. Verdict and judgment for plaintiff.

This suit is brought on this parol contract, for Commonwealth's paper. On the issue of non-assumpsit, there being no evidence, except that which established the foregoing facts, the jury found a verdict for $65, on which the court gave judgment for that amount in Commonwealth's notes; the plaintiff having agreed on the record, to receive the amount of the judgment in such notes.

Instructions asked by the defendant.

Before the jury found their verdict, Bain moved the court to instruct them. First; That a demand by Wilson, of the Commonwealth's paper, was essential to the maintenance of his action. Second; That Wilson had no right to recover paper, specifically, but could only be entitled to its value in specie. And, Third; That if Wilson had made fraudulent representations of the cost of the wagon, he had no right to recover. But

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the court refused to give any of the instructions asked for. And the questions presented to this court, for its decision, grow out of this refusal.

Where a promise to pay in paper currency, a demand is not necessary; the obligee must be sought and the medium brought to him.

A demand by Wilson, was not necessary. Although a paper currency is not a legal tender, nor *stricti juris* money and hence is properly denominated property; yet for many purposes it is *quasi* money. And all the reasons which dispense with a demand for specie, apply to paper money. The latter is portable like the former, and is more conveniently so. It is not like property generally, *onerous*, and therefore, properly payable at the residence of the obligor. But it is strictly personal, because it is carried with or about the person, more generally than any other medium called money; and therefore, should be brought to the obligee. Hence, as on a promise to pay money, without an express stipulation as to time or place, the debt is due instantly, and is payable to the promisee at his residence; so is the promise in this case, such as to oblige Bain to pay to Wilson the amount due on the contract, presently after its date, and without demand.

Where fraud in a sale, the purchaser cannot plead such fraud, in bar of an action for the consideration, unless there has been a tender of the thing purchased, & an offer to recind the contract.

The fraud implied in the second proposition may have been proved. Facts are shown, from which, it may be inferred, that the wagon did not cost as much as Wilson stated to Bain that it had cost.

But surely this did not vacate the obligation resulting from the contract. It may give Bain a right to recover damages in an appropriate action. But it is not a bar to that brought by Wilson. It could not have been plead in bar, unless Bain had offered a recision of the contract, and tendered the wagon to Wilson, in a reasonable time. Which would have amounted to a recision of the contract, on proof of fraud by Wilson. But Bain kept the wagon and sold it. He could not, therefore, pay for it by proving fraud in the sale to him. The court decided correctly on the two first propositions.

But there is error in the refusal to give the third instruction.

He that would avail himself of a

As Wilson was insisting on a statutory privilege, in derogation of the common law, it was necessary that he should prove every thing which was material to

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HILDRETH'S HEIRS vs. M'INTIRE'S DEVISEE.

The judgment is erroneous for two reasons.

First. Cooper was a necessary party to the motion.

Second. The *supersedeas* had no legal effect. The power to award *supersedeas's* was delegated by the reorganizing act, to Messrs. Barry, &c. on their imputed character of appellate judges, and not in their individual capacities as men. They were not judges, either "*de jure*" or "*de facto*" and therefore all their acts as such are void.

Order, purporting to be a supersedeas, granted under the reorganising act, void.

Wherefore, the judgment is reversed.

Hanson, for plaintiff; *Monroe*, for defendant.

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Hildreth's Heirs, vs. M'Intire's Devisee.

Appeal from the Bourbon Circuit; GEORGE SHANNON, Judge.

De facto. De jure. Constitution. Legislature. Appeal. Dismissal. Office. Officer.

Judge ROBERTSON, delivered the opinion of the Court.

CONSTITUTIONAL QUESTION. Case 52.

THE appellants, having prosecuted an appeal, to the court of Appeals, Messrs. Barry, Haggin, Trimble, and Davidge, dismissed it in 1825, because the record was not filed with F. P. Blair, who was acting as clerk to them. A certificate of the dismission, signed by Blair, as clerk of the court of appeals, was presented to the circuit court of Bourbon, (from which the appeal had been taken,) and although objected to by the counsel of the appellants, was received and entered on the record by the court; and thereupon a *habere facias*, was directed to issue, to carry into effect the original decree, to reverse which, the appeal had been granted.

April 15.

Statement of the facts.

Question made and mode of solution.

The only question presented for our decision, is, whether the court erred in obeying the mandate of Messrs. Barry, &c., certified by F. P. Blair? And a solution of this question depends on another, viz: whether Barry, &c. were judges of the court of appeals, and Blair its clerk?

Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that

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character, are totally null and void, unless they had been regularly appointed, under, and according to the constitution. A *de facto* court of appeals cannot exist under a written constitution, which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them.

There cannot be more than one court of appeals in Kentucky, as long as the constitution shall exist; and that must necessarily be a court "*de jure*." When the government is entirely revolutionized, and all its departments usurped by force, or the voice of a majority, then prudence recommends, and necessarily enforces obedience to the authority of those who may act as the public functionaries; and in such a case, the acts of a *de facto* executive, a *de facto* judiciary, and of a *de facto* legislature, must be recognized as valid. But this is required by political necessity. There is no government in action, excepting the government *de facto*; because all the attributes of sovereignty, have, by usurpation, been transferred from those who had been legally invested with them, to others, who, sustained by a power above the forms of law, claim to act, and do act in their stead.

There can be but one court of appeals. An office *de facto* cannot exist under our constitution. It is a solecism. It only results from necessity, where there is a total subversion of the legal government, and a usurpation of all the powers of sovereignty. While the executive and legislative department remain, there can be no *de facto* judicial department, or head of that department, unless it also be so *de jure*.

But when the constitution, or form of government, remains unaltered and supreme, there can be no *de facto* department, or *de facto* office. The acts of the incumbents of such department, or office, cannot be enforced conformably to the constitution, and can be regarded as valid, only when the government is overturned. When there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky, as a "*de facto*" court of appeals. There can be no such court, whilst the constitution has life and power. There has been none such.

There might be under our constitution, and there have been "*de facto*" officers. But there never was and never can be, under the present constitution, a "*de facto*" office.

The gentlemen who directed the appeal in this case to be dismissed, and the one who certified the order

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HILDRETH'S HEIRS. vs. M'INTIRE'S HEIRS.

did not hold office in the court of appeals. The legislature had attempted to abolish the court of appeals, ordained and established by the constitution, and create, in its stead, a new court. This attempt was ineffectual for want of legislative power. The officers attempted to be created, never had a constitutional existence; and those who claimed to hold them, had no rightful or legal power. They were not appointed to the court of appeals, fixed by the constitution. They did not claim to exercise the functions of this court. Their tribunal claimed to derive its origin from the *fiat* of the legislature. The court of appeals, had not been, and could not be abolished. Its judges had not been removed from office, and were acting and ready to continue acting as judges. The act of the legislature, did not intend to superadd four judges to the number already in office in the court of appeals. It cannot receive, and never has received such a construction.

Barry, &c. who claimed to be judges under legislative act, had no power; all their acts, as well as those of the pretended clerk, were null and void. They were neither officers *de facto* nor *de jure*.

The gentlemen, who acted as judges of the legislative tribunal, did not claim to be, and certainly were not associates of the judges of the constitutional court. They were not their successors. They were not the incumbents or *de jure* or *de facto* offices. Nor were they *de facto* officers of *de jure* offices. For if such a thing could be, as a *de facto* judge of the court of appeals, of the constitution, these gentlemen did not hold any such place, for the reasons before assigned. They had no official rights or powers. The appellants were not bound to file their record with their clerk. It would have been useless to do so. They chose not to do it, and cannot be prejudiced by any thing which individuals, destitute of sufficient authority, may have thought fit to venture to do with the appeal. The appeal was not taken to them, it was not properly before them; and every thing which they attempted in relarelation to it is literally void. Their acts cannot be enforced by *law*.

Such is the inevitable consequence of the decision, that they were not judges; that they were not, is our unhesitating opinion; and this opinion is sustained by that of the sovereign people, in their electoral and legislative assemblies; and has been frequently re-

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iterated by the unanimous judgments of our predecessors on motions and otherwise.

The circuit court proceeded on the assumption, that either this new tribunal was the court of appeals, or that it was such a *de facto* court as could exercise judicial functions "*ad enterim.*"

In this, the court erred. Therefore the judgment is reversed.

Hanson, for appellants; *Talbot and Shepherd*, for the appellee.

Griffith's heirs, &c. vs. Wilson.

SCIRE FACIAS

Appeal from the Bourbon Circuit; GEORGE SHANNON, Judge. Case 53.

Ejectment. Judgment. Scire facias. Revivor. Terre-tenants. Heirs.

Judge ROBERTSON delivered the opinion of the Court. April 15.

To revive a judgment in ejectment against several, some of whom have died, it would be sufficient to proceed by *scire facias* against the heirs of the dead, and all the *terre-tenants;* and in such proceeding it would not be necessary to name the tenants individually. If they are not all sued, they should plead in abatement. Cro. Eliz. 896; 2, Salk'd. 598; Ib. 600; 2, Sanders 7, n. 4; Cro. Ja. 506.

To revive a judgment in ejectment, against two, one of whom has died, the *scire facias* must issue against the heirs of the deceased, and the terre-tenant and survivor.

Where the judgment was against one who has since died, the *scire facias* may issue against his heirs alone, without the *terre-tenants*, or without styling the heirs *terre-tenants*. The heirs are liable as tenants, and a *scire facias* against the *terre-tenants* without the heirs, would be erroneous; and there could be no judgment against *terre-tenants*, without the heirs, unless there is a return that there are no heirs, or that they have no lands; 2 Saunders, 8 n. 8. Bac. Abr. *scire facias*; 418.

A judgment against one in a personal action, must be revived against his personal representatives, or against them and the heirs.

But if the judgment be against several, one of whom is dead, it is somewhat questionable, whether a *scire*

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GRIFFITH'S HEIRS, &c. vs. WILSON.

facias must issue against the survivors as well as the representatives of the deceased. There is a contrariety of authority on this point. The *scire facias* being a judicial writ, it seems to be a general rule, that it must conform to the judgment, and consequently issue against all the defendants.

There can be no exception to this rule, when all the defendants are living, and when the reason of the *sire facias*, is that more than a year has elapsed since the judgment, without execution.

But if one of several defendants shall have died after judgment in a personal action, the judgment survives, and execution may issue against the survivor. To make *him* liable to execution, therefore, a *scire facias* is not necessary. It is only necessary to authorize execution against the representatives of the deceased. After judgment against two, if one die, the plaintiff has three remedies. 1st. Execution against the survivor. 2d. *Scire facais* to revive. Or 3d. An action of debt on the judgment. Debt cannot be brought against the survivor, and the representatives of the deceased. It may be maintained against either: but cannot against both.

It would seem therefore by analogy, that a *scire facias*, could be maintained only against the representatives; and such was the decision, in the case of Johnson's executor, vs. Deason, 3d Bibb, 260.

But it is said in general terms, that the *scire facias* must conform to the judgment and therefore, must issue against the survivor, and the representatives; 2d. Salkeld 598; 2 Tidd, 1008; 3 Marshall, 410.

We are inclined to the opinion that the case in 3 Bibb, contains the true doctrine, and that the last authorities cited, have been misapplied, or the reason for the doctrine maintained by them, was peculiar to England and does not exist here. The only reason for this anomalous decision of the law, which we have been able to perceive, is, that as land in England could not be sold for debt; but could only be extended by *elegit*, and as the heir could only be subjected, by a judgment against his ancestor, and another, to an extent for one moiety of the debt, therefore the plaintiff

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could not recover by execution against him, his whole judgment, and consequently, if he proceeded by *scire facias* against him, he must also include the survivor, so as to have execution for his whole judgment; 2 Saunders, 72 p; 2 Tidd, 1028; Ib, 1033. These authorities clearly shew, that the judgment in England, survived against the personalty, but not against the realty, and therefore if the plaintiff chose to make his judgment out of the personal estate, he might issue execution against the survivor, without *scire facias*; but that if he wished to make the real estate liable, he was bound to revive the judgment by a *scire facias* against the survivors and heirs, because the land of neither could be extended for more than a moiety of the judgment. See also 3 Bac. Abr. 698; 4 Ib, 419.

In addition to this, it is material to notice, that Tidd, when in page 1008, he says, that to revive a judgment against two, the *scire facias* must issue against both, is speaking of a *scire facias* to revive a judgment after a year and a day, and not a *scire facias* to revive a judgment abated by the death of one of the defendants; and there can be no doubt, that a joint judgment against several, who are all living, must, after a year, be revived against all.

These considerations, incline us strongly to the opinion, that in a personal judgment, against two, one of whom dies before execution, it is not necessary or proper to issue a *scire facias* to revive against the survivor and representatives. But as this doctrine is not material to the decision of this case, it need not be pursued further, nor definitively settled now, by this court. Whatever the law on this subject may be, in personal actions, there is no doubt, that in real actions or in ejectments to recover land, when a judgment has been obtained against two, one of whom has died, a *scire facias* must issue against the heirs of the deceased defendant, and against the survivor or the *terre-tenants*.

In this case Wilson obtained judgment in ejectment against Hayden and Griffith; before execution, Griffith died. The *scire facias* is against Griffith's heirs alone. The first that issued, was served on Hayden; but as it did not issue against him, the service was a nullity. Those which issued afterwards, included him;

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Mosely vs. Garrett &c

but were not served on him, by order of the plaintiff. Therefore he was not made a defendant. This is a fatal error. He did not appear, and the judgment for execution, was by default. If any *scire facias*, in which he was included, had been served on him, he would have been made a party, and could not object that he was not included in the first; 2 Saunders, 10 n. 11.

A *scire facias*, to revive a judgment in ejectment, must show that the term has not expired.

There is another defect in the *scire facias*. It issued to have execution for the term, but does not shew that the term had not expired; as a *scire facias* is a species of action, it must like a declaration, contain every averment, necessary to shew that the plaintiff has a right to revive the judgment. If the term be ended, the judgment is ineffectual, and no execution can issue. It is therefore indispensable, that the *scire facias* shall shew that the term has not expired.

Because therefore, the term is not set out, and Hayden is not made a defendant, the judgment of the circuit court is reversed.

Hanson, for appellant; *Feemster*, for appellee.

Chancery.

Mosely vs. Garrett, &c.

Case 54.

Error to the Montgomery Circuit; Silas W. Robbins, Judge.

Bill to foreclose a mortgage.

April 15.

Judge Underwood delivered the opinion of the Court.

Statement of complainant's bill.

Mosely, the plaintiff in error, filed his bill in the Montgomery circuit court, against Ashton Garrett, David Trimble, Peter R. Garrett and John Peebles, for the purpose of foreclosing a mortgage, executed on the 25th of September, 1817, by said Ashton, to the complainants, said David, said Peter R. and said John. No depositions were taken, and the cause was finally disposed of upon bill, answers and exhibits. The mortgage shows that the mortgagees were about to become sureties or endorsers for the mortgagor, on a negotiable note or notes, and for the purpose of indemnifying the mortgagees against loss, the mortgagor conveyed to them a house and lot in Mountsterling, whereon he then lived, all the interest of the mortgagor in the firm of Trimble and Garrett, and

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sundry slaves. The mortgage uses this language, that the mortgagees "are about to endorse, on a negotiable note or notes, for the said Ashton Garrett, and to continue the endorsement until the first note and all its renewals are paid up." The bill charges that the mortgagees endorsed a negotiable note, which was discounted by the Bank of the United States, the money drawn by the mortgagor and by him applied to the use of the firm of Trimble and Garrett, (which consisted of David Trimble and Ashton Garrett, the mortgagor) and that it was borrowed for that purpose. That Trimble refused to re-endorse the renewals of the original note, and told Garrett, the mortgagor, he must get other endorsers, as to him, which fact the complainant alleges was unknown to him until he renewed the note. That the mortgagor got Eli Shortridge to endorse, in the place of Trimble. That Peter R. Garrett, having removed from the state, the complainant Shortridge and Peebles continued to endorse until the mortgagor was unable to renew the note further; whereupon the bank brought suit and recovered judgment. That execution was levied on part of the mortgaged property, which sold for more than $1,300, leaving a balance due of $500 or $600, which the complainant would have to pay, owing to the insolvency of the other parties, against whom judgment had been rendered. It may here be remarked, that the exhibits show that the complainant, on the 28th February, 1823, replevied the balance of the debt, amounting to $565 68.

The bill proceeds and charges that the house and lot mentioned in the mortgage, remained unsold, that the legal title was in Trimble, who had sold the same to the mortgagor, who held by written contract, and that Trimble had not been paid the purchase money, as the complainant had recently been informed; that Trimble drew the mortgage, and at the time it was signed, sealed and delivered to him, the complainant and the other mortgagees, did not communicate or make known any claim or lien he had on said lot, for the purchase money or any thing else, and assured the complainant, at the time, there was no danger in endorsing the note. The foregoing are all the allegations of the bill necessary to be considered, so far as the house

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and lot is brought in question, which the complainant is endeavoring to subject to the payment of the balance of the debt due.

Answer of the court.

The answer of Trimble contains the following averments and admissions: He admits that the complainant, himself, Peter R. Garrett and Peebles endorsed a note for Ashton Garrett's accommodation, afterwards negotiated at the United States branch Bank at Lexington, before which, said Ashton executed the mortgage in the bill mentioned, to secure his endorsers against loss, in consequence of their endorsement on that note, and all subsequent endorsements made to renew it. He admits that the mortgage was given on the day of its date, and that on the 11th of September, 1816, he had executed his bond to the mortgagor for the sale and conveyance of the house and lot, in the mortgage and bill mentioned; that he received three notes for the purchase money; that he retained a lien on the house and lot and intends to hold it until the purchase money is fully paid. He admits that he holds the legal title to the house and lot and avers that the purchase money has not been paid. He admits that he drew the mortgage, denies that he failed to communicate the fact that he held a lien on the house and lot; on the contrary he states that he did communicate it to the complainant, and informed him that his, Trimbles lien, would have precedence. He admits that after one or two renewals of the note in bank, he withdrew his name and refused to continue as endorser, and charges that the negroes mortgaged were worth the sum due on the note. He says he believes that the money was all or nearly all, paid over into the firm of Trimble and Garrett, and avers that about the same time, he paid over to the firm about $3,500. He states that the copartnership of Trimble and Garrett was dissolved, by mutual consent, on the 10th of September, 1818, and the goods on hand equally divided, each partner taking half. He states, in answer to the allegations of the bill, on this subject, that Amos Davis was appointed receiver for the firm, to collect debts due it after the dissolution of the partnership, and states his belief that the debts due the firm, collected by himself and Davis, have been paid over in discharge of debts owing by the firm. He states that the partnership was a losing

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concern, and that it is largely indebted to him. He does not disclose the amount of debts due the firm, collected by him, although called on to discover the amount. He does not deny the allegations that the money was borrowed by Garrett for the purposes of the firm, unless the statement that he endorsed for Garrett's accommodation is to be taken as a denial. He does not deny the allegation that he assured the complainant that there was no danger in endorsing the note, but says, "he always supposed that said endorsements were made by the complainant, at the request of said Garrett, and to oblige him, and not this defendant, and that the object of any conversation between him, (to-wit, the complainant) and this defendant, was to consult about the mortgage," &c. These allegations, resting in the knowledge of Trimble, if not denied, must be regarded as admitted.

Where an allegation rests in the knowledge of a defendant, if he do not deny it, it must be considered as admitted.

Under the foregoing view of the bill and answer, the question arises, what decree ought the court to have pronounced relative to the house and lot, and the defendant Trimble? The court below dismissed the bill as to Trimble, and gave him his costs.

Decree of the court below.

This, in our opinion, was erroneous. If Trimble had a lien on the house and lot, for the purchase money, superior to that of the complainant, then the court should have decreed a sale of the house and lot, to satisfy the amount due Trimble, and if there was any balance left, after paying the purchase money, that balance should have been appropriated in pursuance of the mortgage. It could not be told whether there would be such balance or not, until the property was sold. But we are not willing to concede that the lien of Trimble, for the purchase money, was superior to the complainant's under the mortgage; on the contrary, we are of opinion that Trimble, under the facts presented, must be regarded as having waived his lien for the purchase money, and as having assented that the house and lot should become a security for the payment of the notes contemplated by the mortgage. In the case of Springle and Bobbs heirs vs. Morrison, 3 Littell, 55, it is laid down as a general rule, "that the purchaser of an equitable title cannot stand in a better situation than the person from whom he bought. But

If vendor have a lien upon land for the purchase money, and the purchaser mortgages the land, upon a bill, by mortgagee, to foreclose, the court should decree a sale, and appropriate the proceeds, first to discharge the lien of the vendor, and then the mortgage.

If a person holding a lien or having the legal title to real property,

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MOZLY vs. GARRETT &c

stand by and see that property mortgaged or sold, and do not assert his right, or warn the mortgagee or purchaser, he is, in equity, considered as waiving his lien.

to this rule there are exceptions; for if a person having a right to an estate, encourage or even permit a purchaser to buy it of another, the purchaser will hold it against the person who has the right." In support of this doctrine, see also, Sugden. Ven. 539, and the cases there cited. Morrison was deprived of his legal title by being present when the property was sold, and acquiesing in the purchase without objecting to the right of the seller to pass the title, or asserting any claim against or to the lot sold. We think the principles recognized in the decision which compelled Morrison to surrender his legal title, when applied to the facts in the present case, destroy Trimble's lien on the house and lot contracted to Garrett. He wrote the mortgage, he was a grantee in it, and he acquiesced in the taking of Garrett's title by the other grantees and himself, without objecting to Garrett's right to sell, or *asserting any claim against the house and lot.* Thus the complainant was encouraged to endorse the note for Garrett, by the conduct of Trimble. He, therefore, like Morrison, shall not be permitted to resist the complainant's claim, derived from Garrett. We do not forget the allegation made by Trimble, in his answer, that he informed the complainant of his lien for the purchase money, and that it would have precedence over the mortgage. The complainant asserts that Trimble gave him no such information, and there is no proof. As Trimble holds the affirmative, he ought to have proved it; having failed to do so, we cannot receive it as a fact. "*De non apparentibus et non existentibus eadem est ratio.*"

There is another view of this case, worthy of consideration, and which we think entitled to weight, as operating against the lien now set up by Trimble. The money borrowed from the bank was for the use of the firm of Trimble and Garrett, and was appropriated to the purposes of the firm. May not Trimble, therefore, be properly regarded as a principal, in respect to the complainant and the other endorsers of the note? Shall he receive the benefit of the money borrowed, and then withhold property included in the mortgage written by himself, and which the mortgage sets apart to save the complainant and others from loss? We do not consider it essential to give a decisive response to

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these questions. But we may safely venture the assertion that the law of partnership furnishes strong reason for an opinion that Trimble ought to be regarded in the attitude of a principal, and equally bound with the mortgagor, for the payment of the debt to the bank. His having failed to endorse after one or two renewals, can make no difference in this view of the case. The court erred in not decreeing a foreclosure of the mortgage and a sale of the house and lot for the complainant's indemnity.

If a partner mortgage his interest in the partnership property, to indemnify endorsers, & becomes insolvent, the other partner cannot divert the property from the object of the mortgage, & apply it to the discharge of the debts of the firm.

There is also another error in the decree, of importance, as operating against the complainant. After the dissolution of the firm of Trimble and Garrett, Amos Davis was appointed collector of sundry debts due the firm. Davis was made a defendant with a view to reach that portion of the debts of the firm in his hands, or the money arising from their collection, which was conveyed by Garrett to the grantees in the mortgage. Davis, in his answer, admits that he had received debts due the firm for collection; that he had collected some money and paid it over in discharge of debts due by the firm; that he had not fully settled his accounts for collections and payments, but was willing to settle, &c. Trimble, in his answer on this subject, corresponds with Davis, and expresses himself satisfied with Davis's conduct as collector. He had good reason to be satisfied with it, so far as his pecuniary interest was concerned; for it is manifest from the statements of Davis and Trimble, that Garrett's interest in the firm debts, placed in Davis's hands for collection, and which had been conveyed to the grantees in the mortgage, to indemnify them against loss, on account of the debt to the bank, was used to pay debts due by the firm, and which might have been collected entirely from Trimble, and thus the appropriation of Garrett's interest in those debts due the firm, made by the mortgage, was defeated. After Trimble had withdrawn his endorsement as one of the mortgagees, so far as the title of the mortgaged property was vested in him, he held it in trust for the benefit of the mortgagees who continued their endorsements. He ought not, therefore, to be permitted, through Davis, or by himself, to divert the mortgaged property from the course contemplated

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COLE, &c. vs. SHANNON.

by the mortgage. This has been done improperly, and Trimble has received the benefit; as Garrett is insolvent, to the extent of Garrett's interest in the firm, debts collected by Davis, and paid over in discharge of debts against the firm. The court should, therefore, have met the proposition contained in Davis's answer and taken an account of the amount collected by him for the firm, and after deducting all reasonable charges, should have decreed against Trimble to the extent of Garrett's interest in the money so collected, and which had been paid over in discharge of the firm debts, if it were necessary to decree so much after the sale of the house and lot. The cause was prematurely tried as it regarded Trimble.

The complainant is not bound to pursue the negro, Charles, and to subject him, under the mortgage, previous to foreclosing the mortgage on the house and lot, and before he reaches the interest of Garrett in the firm debts. The bill was properly dismissed as to Boswell, because it was not proved that the negro sold him by Norton, was one of the mortgaged negroes, a fact put in issue by the answer of Boswell.

The decree of the circuit court must be reversed and the cause remanded for proceedings to be had not inconsistent with this opinion, and the plaintiff in error must recover his costs.

Triplett, for plaintiff; *Crittenden*, for defendants.

DISCONTINUANCE.

Case 55.

Cole and O'Harra vs. Shannon.

Appeal from the Woodford County Court.

Franchise. Highway. Discontinuance of a Road. Appeal. Writ of error. County Court.

April 16.

Judge ROBERTSON delivered the opinion of the Court.

Unless a person have some franchise freehold, or exclusive interest affected, he cannot question the

AFTER the publication of notice, the county court of Woodford, at the instance of David A. Shannon, discontinued the road in said county, leading from the Leestown road, to Cole's ford, which had been established many years. The road was established no farther than to the margin of Elkhorn, at the ford.

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Cole and O'Harra, who are represented by the record, as the proprietors of the land on Elkhorn, opposite to the termination of the road, objected to the occlusion by the county court, and have appealed from the order, to this court.

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order of the county court, discontinuing a road.

The case comes up for decision, on a motion to dismiss the appeal, on the ground, that the appellants have no right to prosecute it.

Unless the appellants, have some peculiar and exclusive interest, which has been affected, they have no right to question the act of the county court, by appeal or writ of error. Unless some franchise, or freehold to which they were entitled, can be shewn, to be violated by the order, they have no more right than any other citizens, to complain. The road did not, from any thing appearing in the record, pass *through* their land; and therefore the only loss to them, which can ensue from the order, is the obstruction of the right of way, which was common to them and all others. The inconvenience resulting to them, may be greater, than that which others may experience; but it is not the degree, but the kind of damage which gives the right to ask a reversal of the order.

We need not decide whether the appellants could appeal, if the road had passed *through* their lands. Nor is it proper, now to decide, whether there can be any redress for the discontinuance, by a county court, of an established road. We have no doubt that there ought to be some remedy, for any abuse of the power to discontinue roads. It may be exercised without any good reason, and may be perverted to the great prejudice of individuals.

Nor have we any doubt, that if the appellants had any right to make themselves parties to the record, they might appeal, as well as prosecute a writ of error. They could not sue out a writ of error, unless some private right of theirs were affected. If any such right exist, it is a franchise or freehold, which would bring them within the letter of the act of assembly, authorizing appeals.

But the interest exhibited by the record, is not such as will entitle them to a revision, by this court, of the order of the county court.

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For this reason alone, the appeal is dismissed.

Haggin and *Talbot*, for appellants; *Monroe* and *Marshall*, for appellees.

Opinion of the court upon a re-hearing.

Judge ROBERTSON, delivered the opinion of the Court.

The owner of land over which a highway passes, has not such an interest in the road, as to entitle him to question by appeal or writ of error, the order of a county court, discontinuing such road or highway.

This case had been argued before our predecessors, who had not decided it. It was submitted to us, without argument. After the opinion was delivered, it was suggested by the counsel, that it had been admitted on the hearing before the former judges, that Cole and O'Harra owned the land through which a part of the road passed. And thereupon the court, at the instance of the counsel for Cole, and O'Harra, directed a re-hearing. The only question which was to be considered on the re-hearing, and of course the only one which is now to be decided, is, whether the owner of the land through which a public road passes, can prosecute a writ of error, or an appeal to reverse an order of a county court, discontinuing the road.

It was our opinion before, that simply owning the land, does not vest in the owner such a franchise or freehold in the road, as to authorize him to become a party in this court, for the purpose of setting aside an order for its occlusion.

That opinion remains unchanged, as was intimated in the former opinion, it is not the *degree*, but the *kind* of interest which entitles a person to prosecute a writ of error.

The interest which the owner of the land has, in a public highway, passing through it, is of no other kind, than that which, every citizen may claim. The road is established for the public convenience. One man has as much right to use it as another. And the rights of all are precisely the same; and therefore, although one may use it more than another, or may be more benefitted by its use, the interest of all, is the same in *quality*.

If one can prosecute a writ of error, therefore, another, has an equal right to do it.

Owning the land through which a public road passes, gives to the owner no exclusive or peculiar right to the road.

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The road may be very advantageous to him, and furnish facilities, which may greatly enhance the value of his land, so may the contiguity or proximity of a highway, or bridge or ferry to the land of an individual, increase the value of the land, and therefore its discontinuance may subject him, to inconvenience and loss. His interest in the road, or bridge or ferry, would be greater in *quantity*, than that of an individual, who owned no lands, so one who makes frequent use of a privilege granted to the public, may be considered, as possessing a greater degree of interest than another, who, although he has an equal right, does not make the same, or any use of his privilege.

In all these cases, the interest of all the persons, who have been designated, would be the same in kind, although very different in degree. Any one or none of them, therefore may complain to this court. It is admitted, that one, who owns no land, through which the road runs, can not complain. Hence, Cole and O'Harra, cannot appeal in this case. The road did not belong to them. They had no *franchise* in it, They had no other right to it, than that which was common to all others.

An individual, through whose land a road may have been established, may prosecute a writ of error, to reverse the order, establishing it: because, by its establishment, he is deprived of the use of the land, over which it passes. And therefore he is divested of an exclusive and vested interest, in his freehold.

But one who desires a road to be established, to run through his land, cannot procure the reversal of an order, overruling his motion, to establish it; because the refusal does not take from him, any right. It would seem, to result therefore, if there were no other reason for it, that he could not ask the reversal of an order, discontinuing a road through his land. If he can have no right to have it established, he can have none to prevent its discontinuance. The public convenience must be consulted. And the common will, represented by the county court, must prevail, over individual advantages, and wishes. The advantages which any one derives from a highway, are adventitious. The duration of their enjoyment, depends on

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GARRISON vs. HAYDON.

the continuance, or discontinuance of the road, and this depends, not on the will or interest of an individual; but on the common good, and public sentiment. If any individual could be vested, with any right to a road as a franchise or freehold, he might be entitled to a reversal of an order for its discontinuance. But the appellants, have no such right.

Wherefore the former opinion must remain unaltered.

EJECTMENT.

Garrison vs. Haydon.

Case 56.

Appeal from the Jessamine Circuit; W. L. KELLY, Judge.

Deed. Record. Statute.

April 16.

Judge ROBERTSON delivered the opinion of the Court.

A deed must be recorded in the county in which the land may be at the time of recording. The certificate of the clerk of the county, in which the land lay, at the date of the deed, but not when admitted to record, is not such authentication as will authorize the deed, to be used as evidence of title in an ejectment.

GARRISON, in deducing title to a tract of land in Jessamine county, in an action of ejectment vs. Haydon, offered a deed, certified by the clerk of the county court of Fayette, for the land, acknowledged and recorded in Fayette. The land lay in Fayette at the date of the deed, but at the date of the acknowledgment, it was in Jessamine; the latter county having, in the mean time, been established. And the only question to be decided in this case is, whether the court erred in rejecting the deed.

A proper construction of either the letter or object of the act of Assembly, which requires deeds for land to be recorded in the county in which the land lies, must sustain the opinion of the circuit court.

The deed must be recorded in the county in which the land lies at the time the deed is deposited for registration. When a party is about to deposit his deed to be recorded, the act of Assembly addresses him in this language: "Have it recorded in the county in which the land *lies;*" that is, the county in which it lies now, when you make the deposit.

The object of this requisition, is to give notice in the county, of the transferrence of the title to the land.

As, therefore, the clerk of Fayette had no legal right to receive the acknowledgment, his certificate of the

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fact of the acknowledgment, is no authentication of the deed.

The recording a deed not being necessary to pass the title, as between the parties to it, proof of the original by the subscribing witnesses, would have been sufficient for the plaintiff in this case. But as he chose not to offer such proof, and relied on the certificate of the Fayette clerk, he must abide the consequence of his error. See Astors vs. Wells and al., 4 Wheaton, 466.

The judgment of the circuit court is affirmed.

Crittenden, for appellant.

Bucklin vs. Thompson.

CASE.

Error to the Scott circuit; JESSE BLEDSOE, Judge.

Case 57.

Execution. Sheriffs' conveyances fraudulent as to creditors. Statutes. Mortgages. Sales. Instruction. Evidence.

Judge ROBERTSON, delivered the opinion of the Court.

April 16.

Mortgages to Carneal and C. Johnson, by James and R. Johnson.

On the 31st day of October, 1820, James and Richard M. Johnson, mortgaged to Cave Johnson and Thomas D. Carneal, a valuable real estate, consisting of land and slaves, to secure sundry debts, to be due and payable in 1821, 1822 and 1823, amounting in the aggregate to $15,000.

James Johnson's mortgage to Carneal.

On the 1st of October, 1821, James Johnson executed a mortgage to Thomas D. Carneal, on divers tracts of land, houses and lots, thirty-eight slaves, an extensive assortment of farming utensils, a valuable stock of cattle, hogs, sheep, &c. a very large quantity of household and kitchen furniture, consisting of a great variety of rich and valuable articles, and including even bed curtains, spoons, knives, pots, &c. The condition of this deed is as follows, to-wit: "This deed is to operate as a mortgage for certain debts due from the said James to the said Carneal, and for certain liabilities of said Carneal, for the said James; and it is further understood that this mortgage shall stand good, for any debts that may be contracted, between the par-

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BUCKLIN vs. THOMPSON.

ties, as the object of the said James is to discharge debts which he may owe others, and it is the wish of said James that the said Thomas D. should aid him in the discharge of them, when specially requested, and whenever the debts and liabilities before referred to, and any further debts to be contracted as above shall be discharged by the said James, then this obligation to be void," &c. &c.

James Johnson remained in possession of mortgaged property.

James Johnson remained in the possession and use of all the property mortgaged, sold some of the slaves and sent others to the lead mines, on the Mississippi, with the knowledge and consent of Carneal.

His condition at the date of the mortgage.

He owed more than this estate was worth at the date of the two mortgages, as proved by his deposition, and that of R. M. Johnson.

The depositions.

These depositions also state that the mortgage to Carneal was made *bona fide*, and was designed to secure the property from being sacrificed by creditors, and by giving James Johnson the use of it exempt from forced sales, by execution, to enable him to appropriate it and its profits most advantageously, to the payment of debts; and that these mortgages had enabled him to pay at least $50,000 more than he could have paid, without the protection and facilities afforded by them.

It does not appear what advances or whether any were made by Carneal after the date of the mortgage to him of 1821; nor how much was due to him at that time; nor whether, if any thing was due, it was a new debt, or part of it the same secured by the mortgage, to him and Cave Johnson.

Nor does it appear whether the debt for which the mortgage of 1820 was given, had been discharged or not. Neither James or R. M. Johnson says any thing in their depositions about the co-mortgagee, Cave Johnson. But James Johnson swears that Carneal had loaned to him $15,000, and paid for him to the United States Bank $30,000.

Equity of redemption in all the mortgaged pro-

On the 23rd of December, 1822, on the advice of R. M. Johnson, as proved by his deposition, the equity of redemption in all the mortgaged property, was sold

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under two executions against James Johnson and others, for $369, the amount of the executions, and was purchased by William Johnson, a son of James, at the request of his father, as proved by William's deposition, but *bona fide* for himself, as he swears in the same deposition.

Property sold & purchased, by Wm. Johnson, son of James.

The deed from the sheriff to William Johnson, for the equity of James Johnson, is dated December 23d, 1822, but not acknowledged or deposited with the clerk of the Scott county court until the 31st day of May, 1825.

Sheriff's deed to William.

On the 24th day of May, 1825, Bucklin issued his *fieri facias* from the office of the clerk of the Scott circuit court, against the estate of James Johnson, for $747 15 cents, and having delivered it to Smith, a deputy of Thompson, the high sheriff of Scott county, directed him to levy it on the estate of James Johnson, then in his possession in said county, which the sheriff refused to do, unless Bucklin would indemnify him, which he having failed to do, the execution was returned. "*no property.*"

Bucklin issues his execution. His directions to the sheriff, and sheriff's return.

James Johnson had retained the possession and enjoyed the use of the mortgaged property, and was still in the apparent possession and use of it, or most of it, when Bucklin's execution issued: but William Johnson states in his deposition that *he*, (William) had the *control* of it.

Condition of the property.

This suit was brought for a false return by the sheriff.

Suit against the sheriff for a false return.

After much evidence for plaintiff and defendant, in the court below, of which the foregoing statement is the substance, the circuit judge, on the motion of defendant below, instructed the jury that if they believed the testimony, they should find for the sheriff.

Instruction moved by defendant, and given by the circuit court

Whether this instruction was correct or not, is the only question it is necessary for us to decide.

The instruction of the circuit judge is evidently erroneous. The hinge on which the whole case must hang, is the fact of fraud or no fraud in the mortgages, and the sale of the equity of redemption. If any circumstances were proved which the law would adjudge *per se*, fraudulent, or from which a jury might reason-

If any circumstance proved which the law would adjudge, *per se*, fraudulent or from which the jury

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ably infer fraud, as between the parties to the deeds and the purchaser of the equity, so far as creditors were concerned, the court had no right to give to the jury, the peremptory instructions which were given.

might rationally infer fraud, as between the parties, to the mortgage & the purchaser of the equity & creditors, the instructions erroneous. Peremptory instructions only allowed when the evidence is clear and all on one side, even then it is more correct to instruct hypothetically.

When the evidence is all on one side, and is clear, uncontradictory and positive, such an instruction as that given in this case, might be allowed. But even then, it would be unusual, and it would be more proper, to instruct hypothetically, that, if certain facts were proved to the satisfaction of the jury, they should find accordingly.

It does not become necessary for us to decide whether any fact exist in the case, as stated in the foregoing synopsis, which, by construction of law, would render either the mortgages or the purchase of the equity of redemption void, as against the claims of judgment creditors of James Johnson. No instruction to this effect was asked for by Bucklin, and this question does not necessarily arise from the assignment of errors. We shall, therefore, forbear to give any opinion on this point. We will, however, state some general doctrines in the abstract.

General principles announced by the court.

First. If a deed on its face, show that it was made with the design of *hindering* or *delaying* any creditors, no matter what may be the actual or ostensible consideration, it is, "*per se*," fraudulent as to them.

Second. If the deed for personal property or slaves, be absolute, and the possession shall not accompany and correspond with the title, the law denounces the deed as fraudulent.

Third. As between the vendee and the creditors or purchasers of the vendor, or the owner of the right attempted to be passed by the deed, without notice, if the deed be not proved or acknowledged, and deposited for registration in the proper office, within the time required by law, it is absolutely void. What application these principles may have to the mortgage and deed, by the sheriff in this case, we are not *called on to decide;* nor need we now say whether there is any analogy between the mortgage to Carneal and that recited in the case of Ward, &c. vs. Trotter, &c. in 3 Monroe. It will be time enough to do this when the record shall require

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it. For the present we have enough to do, without looking beyond the instruction of the court.

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But the possession of the mortgagor after the date of the mortgage, is not, *of itself*, conclusive and incontrovertible evidence of fraud. Kent, in the second volume of his Commentaries, endeavors to maintain an analogy in this respect, between mortgages and absolute deeds. But the cases cited by him for this purpose, are insufficient to sustain his effort; and are controlled by a preponderating weight of authorities, directly against them. Besides, we cannot admit that the reason for declaring a possession inconsistent with an absolute deed, fraudulent in law, against creditors of the possessor, applies to the case of a common mortgage or conditional sale. And in this we think we are sustained by the authority of the supreme court of the nation, and of those of New-York and Virginia, and Kentucky, and certainly by the public opinion and long and almost invariable practice in our own state. These are strong evidences of what the law is. And whatever it may be, or may be considered to be elsewhere, or whatever arguments of policy may be urged to show why it should have been originally settled differently, we cannot disturb what we believe to be the well established doctrine of this state on this subject.

Mortgagor remaining in possession of mortgaged property, before condition broken, is not evidence of fraud. It may be after condition forfeited.

The possession of the mortgagor, after the forfeiture of the condition, *may* be *evidence* of fraud, and combined with other circumstances, or even alone, may be satisfactory to a jury. It might be so characterized by circumstances as to be irresistable evidence of fraud in fact.

Whether, in this case, the jury ought, if they had been left free by the court, to have found that the property, or any of it, was subject to Bucklin's execution, it is not our province to decide; nor is it proper for us to say whether the court ought to have decided, if asked to do so, that the deeds or mortgage were fraudulent in law.

The jury have the right to weigh and determine the character and credibility of the testimony, when various or contradictory, free from the control of the court.

But certainly, many facts were presented, from which the jury had a right to infer fraud, and if they had done so, their verdict could not have been controlled. It was their province to weigh all the evidence on both

Where pl'tff. has directed

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sides, and deduce from it such a conclusion as right reason, uninfluenced by prejudice, or the mandatory interference of the court, might properly deduce from a survey of all the facts.

the sheriff to levy upon property of the def't. in his possession, tho' mortgaged and equity of redemption sold, and he refuses; unless indemnified, and returns 'no property,' sheriff is responsible for a false return, if the mortgage or sale of equity of redemption be fraudulent as to creditors, tho' plt'ff. refused to indemnify. No claim to indemnity until a jury has found the property not subject.

If either the mortgage to Carneal, or the deed to William Johnson, was, by operation of law, or by a rational induction of facts, fraudulent, the sheriff was bound, by the duties of his office, to levy Bucklin's execution; and should be made liable, for a false return. Bucklin was not bound to indemnify him, unless after a levy a jury had failed to subject the property to the execution, or in other words, had found that it was not subject.

As the court withheld from the jury its right to decide on the weight *and effect* of the evidence, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

Crittenden and *Brown*, for plaintiff; *Chinn* and *Depew*, for defendant.

The Counsel for the defendant, presented a petition for a re-hearing.

Petition for a re-hearing.

From the opinion delivered, by the court in this cause, the counsel for the defendant, have been admonished, that they had relied with too much confidence in their brief, and in the argument upon a few leading questions involved, which had superinduced a neglect to present to this court, all the matters arising out of the record. Some were consequently omitted, of no less importance than the present.

It was believed to be absolutely necessary, that the bill of exceptions should state, that it contained the whole of the evidence, to enable the appellate court to decide upon any questions of law, growing out of the evidence. From the loose and careles manner displayed in the exceptions, such must have been the opinion of the counsel for Thompson, in the court below. It would seem to be a rule of right reason, the nature and effect of a *whole* cannot be known or ascertained from a *part*, with sufficient precision for judicial certainty. From a part of the evidence in a cause, one legal deduction would arise, when from the

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Petition for a re-hearing.

whole an entirely different conclusion would result. In this case, there may be enough, when considered by itself, to satisfy the mind of the judge, that it should have been left to the jury, to decide upon its right. But was it not susceptible of being explained, and reconciled by the testimony of the same, or other witnesses, or other evidences, so as to render the opinion of the inferior court, compatible with the established principles of law. It is true that the bill of exceptions, after reciting some evidence, uses this language. Whereupon the defendant, moved the court to instruct the jury, that if they believed the evidence aforesaid, they must find for the defendant. This we apprehend, is not tantamount to this declaration, that it constituted all the evidence in the cause. If the court upon a part of the evidence, should improperly instruct the jury, which instruction, would have been proper upon the whole; or if the jury should upon the whole evidence find a correct verdict, notwithstanding improper instructions of the court, founded upon a part, no principle is perceived, to exist, upon which this court should interfere with such verdict.

This court has, in their opinion, assumed the position that "the hinge on which the whole case must hang, is the fact of fraud, or no fraud, in the mortgages, and the sale of the equity of redemption." In this we conceive the court has erred. It is an action on the case, against a sheriff, for a false return upon an execution of the plaintiff's, alleged to have been made by a deputy of the defendant. The plea of not guilty, put the plaintiff, upon proof of every allegation in his declaration material to his right of recovery, or cause of action. It was necessary among other things that the plaintiff should prove, that the defendent was sheriff, at the time the execution was in force. And that Smith was his deputy, at the time the execution was in his hands. Upon his failure to adduce evidence, conducing to prove these facts, is was proper for the court to instruct the jury, that the plaintiff had not made out his cause of action, and that they should find for the defendant. We think it may be safely assumed as a correct principle, that in every case, when one sues, in an official character, he must, to entitle him to a recovery, shew that he held the office. Thus on a motion

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by a paymaster, against a deputy sheriff, for failing to account for militia fines, put into his hands for collection, it was held to be indispensable to a recovery, that the plaintiff should prove himself to be paymaster. Helm vs. Haycraft; 2 Litt. 271.

So in a proceeding against one, for a failure in his official duty, it is necessary, first to shew, that he held or exercised the office, otherwise, the proceedings cannot be maintained. Different grades of proof may be resorted to, for this purpose. If it be an office of record, the best evidence would be the authenticated transcript of his qualification in the manner required by law. But proof, that he exercised the office, and claimed and enjoyed the advantages, and privileges thereof, has been held sufficient to charge him. If he is charged with acting in person, then his *return*, or other official writing, in the particular case, may be used as evidence against him. It operates as an estoppel. But if, as in this case, he is proceeded against, on account of the act of his deputy, the record should present evidence of his being sheriff; and of the person alleged, being his deputy, to entitle the plaintiff to recover, the general notoriety of the office of sheriff, and the officer who fills it, would be dangerous grounds upon which to hold one liable, in an official character. It is true that the community of a county, may generally know in every year, who is the sheriff; but very few do know, when the right to exercise the office, commences, and when it terminates. If it were not competent for the jury, in this case, to act upon their own knowledge, or upon general notoriety, as evidence, then there is none in the cause conducing to shew, that when the plaintiff's execution, was put into the hands of Smith, that Thompson, was sheriff of Scott county, as alleged by the plaintiff in his declaration.

We think it is very clear that there is no evidence in the cause, conducing to shew, that Smith was the deputy sheriff, for David Thompson, sheriff of Scott county. The principle is too well settled in this court, to be now discussed, that acts of one styling himself deputy, either by words or writing, are insufficient to charge the principal. They may be good against himself, but against himself alone, so far as the responsibilities of office are concerned.

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Slaughter vs. Barnes; 3 Mar. 412; was a proceeding by motion against the sheriff, for failing to return an execution in the time required by law. The court remarks, there was no *express* proof, that Slaughter was the Sheriff of Hardin county, or that Helm was his deputy, unless the return on the execution, be considered as such, and decides that "the return of a person as deputy, cannot, in a suit against another, as principal be admitted to be evidence, either of the fact, that the latter is the principal sheriff, or that the former is his deputy." The same doctrine is sanctioned and confirmed in the case of Poague vs. Culver, 5 Litt. 132, relative to a receipt, executed by one, styling himself deputy, &c.

Having disposed of the returns, &c. of the deputy, as constituting no evidence, conducing to make out the plaintiff's case to that point, and recurring, to the record we find in the bill of exceptions, it is stated that the plaintiff proved, that after the writ of *fi, fa*, upon said judgment in favor of the plaintiff, was ordered, the said Asa Smith, as deputy of the Sheriff of this county, was ordered to levy, &c. and said Smith replied, &c."

To prove that Smith was an acting deputy for Thompson, might be sufficient; but to prove, that some person regarded him as such, cannot be. His returns solemnly entered in writing, do not conduce to proof, sufficient to charge the principal? Can his replications or sayings, be considered as more imposing? If not, then there is no proof in the cause, that Thompson was sheriff, or that Smith was his deputy; consequently, the court below, did right to instruct the jury that, if they believed the whole of the evidence, they should find for the defendant.

The court is therefore respectfully solicited, to reconsider the opinion herein. The counsel regret, that they had not heretofore presented the point now mainly relied upon; as it imposes upon the court additional labour, when the burthens thereof are already peculiarly oppressive.

The court overruled the petition.

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EJECTMENT.

Eastin vs. Rucker.

Case 58. Appeal from the Scott Circuit; THOMAS M. HICKEY, Judge.

Jurisdiction. Constitution of the United States. Act of Congress. Ejectment. Former judgment.

April 16. Judge UNDERWOOD delivered the opinion of the Court.

Where a citizen of another state is sued in a court of Kentucky, to avail himself of the provision of the constitution of the U. States and act of congress authorizing the removal of such cause into the federal court, such applicant must be proved to be a *citizen* of another state, and the application for removal, must be made during the term at which such applicant enters an appearance.

THE second section, of the third article of the constitution of the United States, confers on the federal judiciary, jurisdiction over controversies between citizens of different states. The twelfth section, of the act of congress, approved, September 24, 1789, directs the mode of removing a suit, from the state to the federal tribunals, when the suit has been brought against a citizen of another state, by a citizen of the state, in the courts of which the suit is instituted. This is an action of ejectment, instituted in the Scott circuit court, by Rucker, a citizen of Kentucky, as lessor of the plaintiff, against the tenant of Eastin, a citizen of the state of Lousiana. Eastin entered as a defendant to the suit in lieu of her tenant, and at that time moved in virtue of the act of congress to remove the suit to the federal court, for the Kentucky district, upon petition and affidavit filed. The court made an order for the removal of the suit as desired. The federal court remanded the suit, stating as the ground for so doing, that they had no jurisdiction of the cause. Upon the return of the suit, to the Scott circuit court; Eastin again petitioned the court, to remove the case to the federal court, which was refused. This refusal to send the cause back to the federal court, upon the second application and proof, constitutes the first error complained of. Upon the first application of Eastin to remove the suit, her citizenship of another state, was not established by the proof; or if it was, the record of the Scott circuit court, did not shew the fact, all that the record stated, is, that she being a *nonresident*, &c., the cause was ordered to be removed, to the federal court. The expression "*non resident of Kentucky*" is not equivalent to *citizenship* out of this state, in another state, nor is it incompatible with the idea of citizenship here. A citizen of Kentucky, may have temporary residence out of the state, and if that be the case, it does follow, that the federal court has jurisdiction of his controversies with a resident citizen of the state. For such temporary resi-

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dence will not divest him of his character, or his rights as a citizen of the state. We are of opinion therefore, that the federal court was right in remanding the cause, as the record, when presented to them, did not present on its face, such a case as is provided for, by the constitution of the United States, and act of congress. When the case returned to the Scott circuit court, Eastin then presented herself, by making proof, that she was a citizen of the state of Louisiana, that the subject matter in controversy, exceeded the value of $500, and that Rucker, was a citizen of the state of Kentucky, in such an attitude, that the court ought to have removed the suit, to the federal court, unless there was some sufficient reason, to justify the refusal, arising from the time when the motion was made, or some other cause. The act of congress, referred to, requires the defendant, who is a citizen of another state, and who desires a removal of the cause, from the state to the federal tribunal, to file a petition, for the removal of the cause at the time of entering his appearance in the state court, and in relation to suits pending, in the courts of Kentucky, brought against a citizen of another state, the application must be, to have the cause remanded to the federal court, for the Kentucky district, next to be holden therein, after entering appearance. This provision of the act of congress, is wisely designed to produce dispatch. It appears from the record, that Myra Eastin filed a petition for the removal of the cause, on entering her appearance, but she failed to prove, that she was a citizen of another state, and for want of such proof, we presume the federal court refused to entertain jurisdiction. Shall Eastin have another opportunity, to make out a proper case, to justify the state court, in removing her suit, and the federal court in entertaining jurisdiction of it? We think not. Such a privilege could not be granted to her, without frustrating the design, manifested by the act of congress, which prescribes the course of procedure in removing suits from the state, to the federal tribunals. It was her fault, or that of her agents or attorney, that the causes for removing the suit were not properly and legally presented, and if she can be indulged in correcting these errors at a term subsequent to that, during which her appearance was entered, it would defeat

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EASTIN vs. RUCKER.

those provisions of the act of congress, which require the cause to be removed to the federal court, next to be holden, after the defendant enters his appearance in the state court. Besides, if more than one application is to be tolerated, we see no principle, by which to limit the number. And if we were now to sustain the exception on this point, and direct the circuit court, to make an order for the removal of the suit to the federal court, that tribunal would most probably decide that it possessed no jurisdiction of the cause, because it was not brought before them in the time required, by the act of congress, and again remand it to the state court. In our opinion, there is no error in the refusal of the court to remove the cause to the federal court. When a citizen of another state, shall be sued, in the courts of this state, by one of its citizens, and shall, at the time of entering his appearance, present all the facts, which are required by the constitution of the United States, and do all things required by the act of congress, to entitle him to a removal of the cause to the federal court, and the state court shall refuse to do it, then a different question may arise from that now before us, and then it may be proper for this court to decide, whether the jurisdiction of the federal tribunals, in suits between citizens of different states, is exclusive or concurrent with that of the state courts. We will not anticipate a decision on that question; but will reserve it, until a fit occasion presents itself.

To a recovery in ejectment, paramount title in the pl'tff. and possession in the def't. at the time of service of the copy, are requisite. A record of a former judgment, in favor of def't. vs lessor of pl'tff. no bar to pl't'ffs. recov-

Upon the trial in the court below, the appellant offered in evidence, the record and proceedings in an action of ejectment in the federal court for the district of Kentucky, shewing that she, as lessor of the plaintiff, had recovered of the appellee, the land constituting the subject of the present suit. The court rejected the evidence, and we are required to decide whether the court did right in rejecting it. By a statute, approved, January 12th, 1825, it is provided in a certain class of cases, that a verdict and judgment in favor of the defendant in an action of ejectment shall be a complete bar, to the recovery of the land in a second suit, the title to which was litigated in the first suit. But the provisions of this act, have no application to such a case as this is, and we must decide the

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question, without regard to the statute. In an action of ejectment, title in the lessor of the plaintiff and possession in the defendant, at the commencement of the suit, are the two things, which must be established, to justify a recovery. If these are made out in proof, the plaintiff ought to recover, unless the defendant can shew a paramount title, in himself or another, or that the lessor of the plaintiff, has lost his right of entry by the continuance of an adverse possession, sufficiently long to bar it. It does not appear from the record offered in evidence, that Myra Eastin, was put in possession of the land, by the execution of the writ of *habere facias*. The verdict and judgment in her favor, in the federal court, was no proof, that she had a paramount title, when the suit was instituted by Rucker, against Morriss, the tenant in possession: It is no proof that Rucker's right of entry was tolled. We cannot therefore perceive how it could legally operate to make plain, and to elucidate the points involved in the issue. It was therefore properly excluded. The only remaining question for decision, relates to the refusal of the court to give certain instructions to the jury, asked for by the defendant. These instructions, were all predicated upon the supposition, that the evidence proved or conduced to prove, that Myra Eastin, by her tenants, had possession of the land in controversy, before Rucker first acquired the possession, and that Rucker, by a contract with Timothy Marker, a tenant of the said Eastin, had obtained possession, and that he was estopped, to deny Eastin's title, in consequence thereof. We admit the doctrine, that a tenant cannot attorn or sell his interest in the term unexpired, and thereby, prejudice the title of his landlord. But we have searched the record in vain, to find proof, shewing that Marker, was Eastin's tenant. On the contrary it appears, that Marker came into possession, as assignee of Amos Mount, the lessee of George G. Taylor, who sold and conveyed the land to Rucker. We cannot perceive in the record, the shadow of title in Myra Eastin, independent of the verdict and judgment of the federal court, in her favor, already disposed of. Nor do we discover any thing in the record connecting her with the possession held by Mount and Marker. The instructions asked for and refused, were

ery, unless connected with such adversary possession, as tolls his right of entry.

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BRECKENRIDGE'S H'RS vs. ORMSBY.

therefore, if good law, mere abstract propositions, which the court were not bound to give. Besides Rucker in this suit, was not in possession, and resisting the recovery of possession, by his landlord. Were that his attitude, we admit he ought not to be permitted to deny his landlord's title. Rucker is out of possession, and in this suit, is endeavoring to gain it upon his own title, and we cannot perceive, if it were admitted he was once tenant to Myra Eastin, how that fact should prevent his recovery. There is nothing in the record to shew the termination of the lease, from Taylor to Mount. For ought that appears, the term may have expired before the institution of the present suit.

The judgment of the circuit court is affirmed The appellee must recover his costs.

Crittenden and *Chinn*, for appellant; *Haggin* and *Depew*, for appellee.

CHANCERY.

Case 59.

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Breckenridge's heirs vs. Ormsby.

Appeal from the Jefferson Circuit; HENRY PIRTLE, Judge.

Jurisdiction. Void. Voidable. Non compos mentis. Subsequent purchaser. Mortgage. Decree. Jurisdiction. Parties.

April 17.

Judge ROBERTSON delivered the opinion of the Court.

Statement of facts and proceedings growing out of the mortgages, sales, &c. previous to filing complainant's bill in the Jefferson circuit court.

IN 1800, Walter Beall mortgaged to Robert Andrews and John Pierce, in trust for Samuel Beall, various tracts of land, town lots, &c. In April, 1801, he mortgaged the same property to John Breckenridge, to secure the payment of £1000. In 1802, he mortgaged it again to John Breckenridge, as security for another liability, and recognized and referred to the mortgage of 1801. In 1804, he sold one of the mortgaged lots to Peter B. Ormsby, and made him a deed for it. John Breckenridge and Walter Beall, both having previously died, in October, 1811, the representatives of Breckenridge brought a suit in chancery in the Fayette circuit court against N. B. Beall, the administrator, and Samuel Beall the devisee of the decedent, W. Beall, and against the trustees, Andrews

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and Pierce, praying a foreclosure of the mortgage of 1801. In the progress of the suit, the heirs of the decedant, Beall, were made defendants. The administrator acknowledged service of the *subpœna*, and it was executed on S. Beall in Fayette. The heirs answered, and there was a publication for eight weeks against the trustees. BRECKENRIDGE'S H'RS vs. ORMSBY.

A foreclosure of the equity of redemption and sale of as much of the mortgaged property as might be necessary, were decreed by the court; and among other things, the lot in Bardstown, in the possession of P. B. Ormsby, was sold by the commissioner appointed by the decree, and purchased by P. B. Ormsby himself, for $4030, for which he executed bond, with the said N. B. Beall his security. Having failed to pay the amount of the bond, when due, suit was brought on it, and judgment obtained against him and N. B. Beall, in the Jefferson circuit court. The property of P. B. Ormsby was sold by execution, to satisfy this judgment, and was purchased by his brother, Stephen Ormsby, on a credit, and who executed his bond therefor. N. B. Beall had filed a bill of review, to correct the decree, and failed; and he and P. B. Ormsby had made a motion, in the same court, to set aside the sale and quash their bond, which also failed.

This suit was instituted in the Jefferson circuit court, by P. B. Ormsby, for the purpose of enjoining the payment of his bond, by Stephen Ormsby; and the bill relies principally on these grounds. First. That Walter Beall was in a state of lunacy in 1801, when he executed the deed of mortgage to Breckenridge. Second. That the decree is inoperative and void, for want of jurisdiction in the Fayette court, the defendants and all the mortgaged property, (as alleged) being in other counties, and for want of proper parties. Third. That P. B. Ormsby did not know when he made the purchase of the lot; that he could prevent the sale, or avoid the decree. Bill filed by compl't. and grounds of equity relied on.

The circuit court of Jefferson granted the injunction, and by its final decree, made it perpetual. And this appeal is prosecuted to reverse this decree. Decree of circuit court.

The main questions which the assignment of errors presents for consideration, are: First. Whether (ad- The questions presented for

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consideration and revision.

mitting the alleged lunacy) the deed of 1801, was void or voidable? Second. If only void, whether it was confirmed by that of 1802, when, it is admitted, that Walter Beall was *compos mentis?* Third. If not confirmed, whether Ormsby, as a subsequent purchaser, can avoid it? And, Fourth. Whether the Fayette decree can be questioned, in this suit?

Parallel between the legal consequences of the acts of infants and lunatics; the acts of each alike void or voidable.

A parallel is supposed to exist between the civil acts of lunatics and infants. This is the well established doctrine of the law, as evinced by a series of decisions, in England and the American states. It is not necessary to inquire into the reason or fitness of this analogy. Its judicial sanctions give it the irresistable force of unquestionable authority. But if there had been no decision upon it, we should be inclined to the opinion that the contracts of lunatics and infants, should be identical in their legal effects; and that such acts of an infant as are void, should be void if done by a lunatic; and such as are only voidable by plea of infancy, should be but voidable by reason of lunacy. The only exception to this parallelism is, that (according to a preponderance of authority,) the lunatic cannot, himself, like the infant, plead his disability. We know of no other. The authorities conclusively show that the contracts of infants and lunatics, are alike void or voidable. 3 Bac. Abr. 301; 1 L. Ray, 313; Highmore, 113; 3 Mod. 308.

Infants and lunatics were placed on the same footing of entire exemption from liability for any contract, by the Roman law; Institutes Lib. 3 tit. 20. And it is admitted by all the counsel in the argument of this case, that when contracts of the one are only voidable, those of the other class are not void.

The deed of W. Beall, of 1801, placed on the footing of a deed by an infant.

If there be any difference between the effects of a contract by an infant and that of a lunatic, it must be to the disadvantage of the latter; for as it seems to be generally admitted that a lunatic cannot avoid his acts, by plea of stultification, there might be some difficulty (if such be the law) in determining that any of them could be absolutely void.

However this may be, it will be sufficient for the decision of the first point in this case, to consider the

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deed of a lunatic, as a deed by an infant; and this we shall do, because the authorities are more abundant and more satisfactory on the voidness or voidability of deeds by infants, than of those by lunatics.

It will be fair then, to consider the deed of 1801, in this case, as one executed by an infant, and if in so considering it, the result shall be, that it is only voidable, the appellee will certainly have no right to complain; because it could not, in that event, be more than voidable by W. Beall, even if his lunacy had been indubitably established.

It is somewhat doubtful, whether Walter Beall was, in the proper sense of the term, a lunatic in 1801.

The deed of a lunatic is not void, but voidable, and cannot be avoided by sane party.

The evidence is contradictory and unsatisfactory. It is numerically on the side of incapacity. But when carefully scrutinized, leaves the mind in serious doubt and perplexity. If this were, therefore, the only point in the case, we should scarcely be willing to decide against the conclusive validity of the deed. But waving a decision of this fact, and admitting the lunacy, as if well established, is the deed void or is it only voidable? The answer must be, that it cannot be more than voidable. There is not a perfect coincidence in all the decisions and dicta on this subject. But the force of the argument and the weight of the authorities decisively preponderate against the assumption that the deed is void.

Difference between common and civil law in regard to contracts by infants.

The common law, in this respect more liberal and more advantageous to the interests of infants, than the civil code, enables them to make some contracts which they cannot avoid, and others which they may avoid or not, as they deem most expedient. Very few of the contracts of infants are void. And it is well for them that such is the law. For deplorable indeed, would be their condition, if, during the period of their minority, which is fixed by arbitrary law, they could make no contracts for their own benefit. Their legal disability would then be the opposite of what it was intended to be. It would be a handcuff instead of a shield. And the law would be their worst enemy, instead of being, as it professes to be, their guardian and best friend. For if all the contracts of infants be *void*,

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they are not only not binding on them, but create no obligation on those with whom they may be made; and infants would be thus doomed to vassalage, and frequently to destitution and oppression.

Privilege of infants in avoiding their contracts.

The enlightened benevolence of the common law, therefore, enables infants to make valid contracts with adults; and to secure their inexperience and imbecility from imposition, allows *the infants, but not the other parties*, the personal privilege of avoiding them, if they shall consider them disadvantageous. This is exactly as it should be. There are very few contracts from which the adult party can escape under cover of the disability of the minor party. And it is questionable whether it is consistent with sound policy and the reason of the privilege of infancy, that there should be any. But those whose light we are bound to follow, have, for ages, admitted that there may be a class of contracts with infants, which are entirely void, and which, *therefore, either party may disregard.* And although we may be unable to perceive the wisdom or justice of the distinction, it has become the law.

The rule as to what contracts are *void*, & what *voidable*.

A contract is void when it is a nullity, obligatory on neither party, and insusceptible of ratification; when either party is bound, or it may be confirmed, it is only voidable. What this class of void contracts is, has not been yet ascertained with satisfactory precision. There are some dicta which countenance the inference that all contracts are void, unless the thing contracted about pass by a delivery of it. This doctrine is relied on by the appellee. Other authorities insist that all parol contracts which are, on their face, prejudicial to the infant, and such by deed as do not take effect by delivery of *the deed*, are void; and that all others are merely voidable, excepting those for necessaries, which, generally, are binding. Of the two, the latter, we consider the better doctrine of the law; and one more accordant with reason than the former. The only objection to it, is that it may be too comprehensive. We doubt whether the same test should not be applied to contracts by infants for personal and for real estate, to those which are parol, and those which are by deed. And we doubt too, whether the fact that a deed does or does not take effect, to pass title by a delivery of the

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deed, should have a decisive influence on the question, whether it be void or voidable.

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The distinction between the delivery of the deed and that of the land, seems to be arbitrary, and to have obtained the apparent force of authority, either by the application of reasons peculiar to the ancient tenures and conveyances of England, or by a blind acquiescence in loose "*obiter dicta*." And as there is some diversity in the decisions on this point, and the old prevalent doctrine seems to be irrational and not precisely defined, we do not know that we should recognize it, if it were material to do so in this case. We incline to the opinion expressed by Lord Mansfield, that "*there is no instance where the other party to a deed can object on account of infancy;*" and consequently, that *no deed* of an infant is void, for infancy only, unless one might be so, which would be embraced by the following classification, suggested by the same jurist: "If a new case should arise where it would be more beneficial to the infant that the deed should be considered as void, if he might incur a forfeiture, or be subject to damages or a breach of trust, in respect of a third person, *unless* it was deemed void, the reason of the privilege would warrant an exception, in such case, to the general rule." If cases of this kind can occur in this country, in which it will be advantageous *to the infants* to consider the contract void, it would be consistent with the reason of the privilege accorded to infancy, to render it void. But such cases can rarely, if ever happen. And it is doubtful whether it would not be better for infants that none of their contracts should be avoided, by any other persons than themselves, and consequently whether it would not be best that all their contracts should be only voidable. Be this however, as it may, we are very well satisfied that a deed which passes a right by the delivery *of the deed*, is not void; and whatever else the authorities may intimate, they clearly prove this.

A general principle, that no deed made by an infant, is void for infancy alone. If any exception; only when to declare it void, would concur with the privilege of the infant, and be for his benefit.

When the right passes by delivery of the deed, deed not void

The leading cases which tend to the contrary conclusion, are those of Thompson vs. Leach, 3 Mod. 310, and Loyd vs. Gregory, Cro. Ch. 502. The dicta to the same effect, in some elementary treaties, were inadvertently copied from these cases. These authorities

Leading cases to the contrary.

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will be found, on a strict examination, to be entitled to but little respect. The cases turned on other points; and the allusions to the livery of seisin, are "*obiter* sayings." *And the word "void" is used synonymously with "voidable."*

These cases, therefore, furnish very little weight of authority. Besides, they have been overruled by the case of Zouch vs. Parsons, 3 Burrow, 1805–6–7–8, and by many other cases.

Authorities & cases establishing the principle.

In Zouch vs. Parsons, a deed of lease and release (where there was no livery of seisin, as in the case of a feoffment,) was declared not to be void; and this, ever since, has been considered a leading and authoritative decision. In his opinion, Lord Mansfield, among other things, says "*there is no difference in this respect*, (viz: as to the effect on infants) *between a feoffment and deeds which convey an interest. The reason is the same.* The delivery of the deed must be in the presence of witnesses, as much as the livery of seisin. The ceremony is as solemn. "That the witnesses would not attest if they saw him an infant," holds equally as to both. "The distinction between the deeds of *femes coverts* and infants, is important; the first are void, the second voidable." Speaking of the cases, in which it had been said that leases without reservation of rent and surrenders, are void; he says, "as to the first there are many *obiter* sayings, but there is no sufficient authority, to outweigh the reasons against this position. *I cannot find a case adjudged singly upon the ground.*" Then refering to some cases cited in argument, he says, "the lease was by parol. But reason soon prevailed, and it has long been settled, that an infant may make a lease without rent, to try the title," &c. "What seems decisive is, that the lessee can, in *no* case avoid the lease on account of the infancy of the lessor; which shows it not to be void, but voidable only. And it is better for infants that they should have an election." And as to the case of a surrender, he says, "I know of no judgment upon the ground that such a surrender is void. Most undoubtedly, the other party cannot say so."

"The end of the privilege is to *protect infants.* To that object, therefore, all the rules and exceptions must be directed."

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Other authorities are abundant. Lyttleton says, "If before the age of twenty-one, *any deed* or feoffment, grant, release, confirmation, obligation or *other writing*, be made by any of them, all serve for nothing and *may be avoided.*" He did not mean that they are all void. He places them all on the same ground, and declares that they "may be avoided;" clearly showing that they are only voidable, and *all equally so.*

"The delivery of a deed cannot be void, but only voidable;" Bro. Abr. title, *dum fuit infra etatem.*" *He*, (an infant.) *may* avoid it (that is a deed) *when he will*; 2 Inst. 673. Therefore Coke did not consider the deed void. The lease of an infant is voidable only, Cro. Jas. 320; Ral. Abr. 731. An infant cannot plead *non est factum* to his deed, because it has an operation from its delivery; Cro. Eliz. 115; 1 L. Ray. 315; 17 John. 373; 2 Starkie, 724. "The deed of an infant is not void but only voidable; Ib. If an infant deliver a deed, and when he attains legal maturity, deliver it again, the second delivery is void, because the first is good until avoided; Perkins Sect. 154. A deed by an infant conveys a seisin and passes a right to the grantee; 14 Massachusetts Repts. 462. All contracts under seal by infants, have a legal force until avoided; Ib. "All such gifts, grants or deeds, made by infants, which do not take effect by delivery of his hand, are void; but all gifts, grants or deeds, made by infants, by matter, in deed or in writing, WHICH DO TAKE EFFECT by delivery of his hand, are voidable by himself, his heirs, and by those who have his estate;" Perkins Sect. 12. This shows clearly that all deeds which take effect, or pass a right, by delivery of the deed itself, are only voidable. It is susceptible of no other construction. And this construction and the conclusive authority of the extract, are recognized by Lord Mansfield, and by this court, in the cases of Cannon vs. Alsburry; 1 Marsh. 76; and Philips vs. Green, 3 Ib. 7.

If the thing, or a right to it, pass by delivery of the deed, the deed is not void. Since the statute of Henry the VIII, called the statute of Uses, there are many modes of conveyance which pass the title as effectually as a feoffment, with livery actual or symbolical. And the execution and delivery of which deeds are au-

Since the statute of Uses 27; Hen. 8, and the act of Kentucky of 1797; sec. 12, relative

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to conveyances: deed executed and delivered, passes title as completely, as *feoffment & livery* of seisin.

thenticated in a manner as solemn and as public as feoffments were by the antiquated ceremonial of livery of seisin. And even before that statute, deeds of covenant, for the payment of money or the performance of some other act, were as effectual in vesting a right in action, as they have been since. And it cannot be admitted that they are void when executed by infants. But they should all be void, if the delivery which has been required, mean a manual tradition of the thing, the right to which is transferred by the deed or writing. In this country there is no livery of seisin. A deed when delivered, passes the whole right, including the possession. Kentucky act of conveyancing of 1797, Sec. 12, and Green vs. Liter, 8 Cranch, 234. A deed in this country, perfects the title. A feoffment did not pass the right. It was the livery which transferred it. A deed, when delivered, has the same effect here to pass the title, that a feoffment with livery had in feudal times. Is it not then reasonable, that in all respects it is as effectual, as the feudal conveyance, by feoffment with livery. If it is as effectual on all others, why not equally so on infants? It is so. No reason can be imagined, for making a feoffment more valid than a deed of bargain and sale. And every reason for rendering a feoffment by an infant operative until avoided by himself or representatives, applies with full force to every other deed. Perkins was not mistaken, nor were Mansfield and those who have succeeded him; nor were the court of appeals, of this state and of other states, mistaken in the construction given by them to the 12th section of Perkins.

The deed of an infant may be confirmed without an acknowledgement or delivery, or new deed; Bac. Abr. title infancy; 15 Massachusetts Repts. 220; 11 Johnson's Repts. 541–2–3; 14 Ib. 124; Bingham on infancy, 65. It cannot, therefore, be void. Blackstone says, "Idiots and persons of non sane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable, but not actually void;" thus distinctly placing all the persons mentioned on the same ground, and declaring that none of their deeds are void.

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The deed of a lunatic or person of non sane mind, is only voidable; Beverley's case 4 Co. Repts. 123, b. 2 Black. Com. 290; Newland, 16; Shepds. Touch. 233. And all the cases which tend to the doctrine that a lunatic cannot stultify himself, at the same time show, in advocating that position, that if they are right, the deed of a *non compos* cannot be void; because if he cannot avoid it, a present interest passes by it, and it is good against him. If a lunatic may plead his disability, still it is clear that the other party to the contract cannot avoid it on that account, and therefore it is not void. And there is, as before stated, no reason why a deed by a person of non sane mind, should be void, when that of an infant would be only voidable.

A present interest passes by the deed of a lunatic, it is not *void*, but only *voidable*.

As to infants, we feel very clear, that the sound and rational doctrine is that their deeds are not void; unless on their face they show that it is impossible that they can be beneficial to them; and we are not well satisfied that even then, it would not be better and more consistent with principle and policy, that they should be only voidable. If there be any sensible criterion for determining what deeds of infants are void, we are inclined to the opinion that it is not the "delivery;" but the semblance or possibility of benefit to the infant. And that if this be a good test at all, it should apply to all cases with equal effect, whether they be contracts in writing or by parol; excepting such acts as pass or create rights or obligations, by record (for these can only be avoided during infancy.) Such was the opinion of Lord Raymond, in the case of Holt vs. Clarencieu, and seems to have been the opinion of the learned annotator to Fonblanque; and one reason which (if there were no others,) we would rely on in confirmation of this sentiment, (that no deed is void if it may be for the infant's benefit,) may be seen in the acknowledged fact which seems not to be doubted by any, that all such deeds may be confirmed; which could not be the case if they were void; "*nam quod ab initio non valet, in tractu temporis non convalescet.*"

A parol lease by an infant, is not void; 1 Modern. 25. Comyn, on the authority of the dictum in Thompson vs. Leach, and of Perkins, Sct. 13, lays it down that the bond of an infant is void. By looking into these

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cases, it will be found that the word void only means "not binding;" or in other words, "voidable." In the case in Croke Elizabeth, 920, it is evident that the reporter uses the word "void" in the same sense as "voidable."

That which may be *confirmed* by assent, when disability removed, or which cannot be avoided by the adult or sane person, not void.

In Thompson vs. Leach, 2 Salkield, 675, the court says, "the bond of an infant or *non compos* is *void, because the law has appointed no act to be done to avoid them*;" thus plainly showing by the reason assigned, that such bonds are only voidable. And so it is of all, or nearly all the cases which use the word void, in reference to deeds and bonds of infants and persons *non compos*. The application of one test alone, will undeniably prove it. All those acts may be ratified or confirmed after the removal of the disability, without any new consideration; and in all of them the adult and sane party is bound, though the infant and lunatic may avoid. The references already made, clearly show this; in addition to which, the following are cited: "If an infant after age, promise to pay a bond executed when an infant, he is bound;" 2 Term Reps. 776. "This could not be if the bond had been void;" Cro. Eliz. 700.

In Cro Eliz. 920, it is said that a penal bond, by an infant for necessaries, is "void;" but that a single bond is "valid." It is obvious that the court mean that the penal bond is voidable. And this will be self evident by scrutinizing the case as stated by Coke. It shows that a single bond for necessaries, cannot be avoided, but that a penal bond may be; and therefore, is not binding until ratified or assented to after the infant is twenty-one, and consequently is voidable. Some of these cases show how carelessly the word void has been used. A security given by an infant for another, is only voidable; 2 Term R. 766.

A lease by an infant without reservation of rent, is voidable only, and he cannot plead *non est factum*; Noy. 130; 2 Institutes, 483; 5 Co. Rep. 119; See also, some of the foregoing authorities showing that the adult party is bound.

An unequal partition is only voidable Co. Litt. 171. If any of the contracts of infants shall be held void,

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it should be such only as, not apparently, but *necessarily* operate to his prejudice; 13 Mass. Rep. 240; 14 Ib. 461.

A deed of bargain and sale by an infant, is not void but only voidable; 6 Mass. Rep. 78; 1 New Hampshire Rep. 73.

Conclusions from the foregoing principles and cases

Without amplifying more, it seems to the court, that it is authorized to deduce from the cases cited and the principle involved in them all, when analysed, the following conclusions:

First. The fact of title passing by delivery of the deed, or of the thing granted, is not more essential in considering whether the deed of an infant or *non compos* be void or voidable, than it would be in the case of an adult and sane person.

Second. Nor is the semblance of benefit material as an exclusive criterion.

Third. If "the delivery" be a proper test, it is the delivery of the deed and not of the thing granted.

Fourth. But the rule laid down by Mansfield, seems to be the only just, rational and consistent one; that is, that none of the contracts of infants are void, except such as those, in which it would be better for the infant, *as a general principle*, that they should be void, than voidable.

And, Fifth. No contract of an infant or *non compos* is void, if it can be confirmed or is binding on the other party to it; and the cases cited to prove that deeds and bonds of infants, &c. are void, prove, when subjected to this test, that they are only voidable.

And surely the doctrine could not be tolerated in this country, that all deeds by infants are void, and binding neither on them nor the other parties to them. But such must be the consequence, if all are void that do not pass title by livery of seisin; for there is no livery here. And if the delivery of the thing were necessary in the case of a deed, it would be equally so in other contracts. It would be equally preposterous to decide that bonds and other contracts of infants are void, unless they exhibit the semblance of benefit. If any such contract be void, it is only such as cannot *possibly* be beneficial to the minor party.

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The privilege of infancy, being personal, the other party to contracts with infants, are and should be bound. It is enough for the protection and security of the infant, that when he acquires legal discretion, he may avoid or affirm contracts, made when an infant. And this security is increased, by not permitting an adult party with whom an infant contracts, to treat such contract as a nullity. Bind the other party, but leave the infant free. This is the doctrine of the books. It is the dictate of reason, and is the only maxim that accords with the privilege of infancy. There may be exceptions as stated by Mansfield.

The deed from W. Beall, to P. B. Ormsby, must be adjudged *voidable, not void.*

But if on a deed, the proper test be the delivery, the foregoing considerations and citations are deemed sufficient to prove that on that hypothesis, the deed in this case is voidable only; because the right passed by delivery of the deed, not of the land.

If the possibility of benefit be the proper test, then the deed in this case, can be no more than voidable, for it was evidently beneficial. And if neither should be the test as we should say, (in the absence of authority) of course the deed is not void.

The next question which occurs, is, can the appellee (admitting the insanity,) be permitted to take advantage of it?

Privies in *blood* and in *representation* may avoid the voidable deeds of *infants & lunatics.* Privies in law and estate cannot.

A purchaser is such a privy, by *representation*, that he may avoid the deed of an *infant* or *lunatic* vendor, when such

Privies in blood and in representation, may avoid the voidable deeds of infants and lunatics. All the authorities, without any contrariety, concur in this. But whether purchasers, have the same privilege, has not been certainly ascertained by the same unvaried uniformity of opinion. Their right will depend on what is meant by the authorities which decide, that privies in estate cannot avoid. The words, "are voidable by himself, by his heirs, and by those who have his estate," in the twelfth section of Perkins on the effect of deeds by infants, have received different constructions. Some judges have supposed, that he meant by the words, "who have his estate," those who hold by purchase, in contradistinction to heirs. This was the opinion of the supreme court of New York, in the case of Jackson vs. Burchin, 14 John. 127. The only reason assigned by the court for this construction, is, that in Zouch vs. Parsons, and in Shepherd's Touch-

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stone, 233; the twelfth section of Perkins, is recognised as sound law. But Mansfield and Shepherd have not said, that the phrase "*who have* his estate," means purchasers. They say nothing about this. They refer to Perkins, to prove only, that a deed, passing by delivery, is only voidable. And it is very evident, that the expressions last quoted from that section, are susceptible of other constructions, than that given by the court of New York, as will appear, not only by an analysis of the whole section; but the authorities, which would apparently establish another and different doctrine. Therefore, as the opinion in 14 Johnson, seems to be founded on a misconception of Lord Mansfield and Shepherd, and assigns no other reason in its support, than they had said, what they never did say, it should not be regarded as entitled to much influence on this point. 1 Fonblanque, 50, 51, asserts, that neither privies in estate, nor by tenure, can avoid the deeds of infants or lunatics, and he is supported in this opinion, by 4 Coke, 124; 8 Ib. 42, b. Whittenham's case; Newland 19; Jacob's Law, Dict. title infancy. Highmore, 114, and other authorities. Jacob, after quoting the expressions from Perkins, (those who have his estate) says "but privies in estate, such as the donor of an estate tail, &c., and privies in law, as the lord by escheat, shall not avoid, &c," and Highmore suggests, that the right to avoid the deeds of persons *non compos*, is founded on the statute of 17 Ed. 2; which declares, that "after the death of such idiot, he (meaning purchaser) shall render it (the estate) to the right *heirs* so that," &c. None of these cases, use the word purchaser. But in exemplifying their doctrine, they mention as privies in estate, by tenure in law, *only* remainder men, tenants, lords of escheat, and others of the same kind. The decision in Johnson, so far as it applies to a purchaser may be reconciled, with these apparently opposing authorities, and Perkins may mean purchasers, in the language quoted. We think he does. The case cited from Johnson, was one in which an infant who had made a deed to A, after he came to the age of twenty-one, conveyed the same land to B, and the question was, whether B. could take advantage of the infancy. It

deed might be avoided by the vendor, or his heir.

If A, while an infant, deliver a deed to B, and, when A attains his full age, he

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was decided, that he could: because, in the language of the court, Perkins, in the twelfth section, laid it down, that privies in estate had that right. Although the court, may have erred in this construction of Perkins, and thus gave a reason for its opinion, which was too comprehensive, yet we concur in the opinion, that the last purchaser might avoid, not because a privy in estate may avoid; but because a privy by contract or representation may, and such is a purchaser.

delivers a deed for the same land to C, C may avoid the deed from A to B.

None of the cases in which it has been held, that privies in law, and in estate, cannot avoid the voidable deeds of infants and lunatics, have mentioned, or by their terms include a subsequent purchaser from the person laboring under the disability. And we are of the opinion, that when they speak of privies, who are not allowed to avoid, they do not mean such purchasers; but such persons as hold by privity of estate alone. Privies in estate, strictly mean, those only between whom, there are certain rights and relations resulting from the estate held, and not from contract between them. Such a privity in estate, or in law exists between a lessor and a sub-lessee, a vendor by deed of warranty, and a remote vendee or assignee, the lord by escheat, and the *terre-tenant*, &c. In such cases there is no right or obligation between these parties, growing out of any contract between them. All their rights, as between themselves, are created by the privity of estate. But it is not so between the lessor, and his lessee, the vendor and his immediate vendee. The rights and obligations which subsist between these are produced by their contract principally.

The difference between privies *in estate*, and privies *by contract*. The heir, personal representative, or purchaser from an idiot, or *non compos*, subsequent to the avoidable deed, may avoid the same, after the death of the idiot or lunatic.

There is no privity of estate, between a lessee, and assignee; 1 Salkield, 317. It is only where an interest in the same estate, without any contract between the parties, (called privies in estate) constitutes them privies, that they can, with strict propriety and precision, be denominated privies in estate. And although there can be a privity of estate *and* of contract, between the same parties, the authorities which maintain, that "privies in estate" cannot avoid the deeds of infants, &c., must mean those only, whose privity is exclusively that of estate. Blackstone, in the 2d vol. of his Commentaries, page 335, says, "privies to a fine

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are such, as are any way related to the parties who levy the fine, and claim under them by any right of blood or the right of representation; such as are the heirs general, of the cognisor, the issue in tail, since the statute of Henry the VIII; the vendor, the devisee, and *all others who must make title by the persons who levied the fine*. For the act of the ancestor, shall bind the heir, and the act of the principal, his substitute, or *such as claim by any conveyance, made by him subsequent to the fine levied.*' The same doctrine is affirmed in Coke's Rep. 87. And Blackstone says in the same book; (2 Comr's 291) "clearly the next heir, or *other person interested*, may after the death of the idiot, or *non compos*, take an advantage of his incapacity, and avoid the grant." He means by "other person interested," the personal representative, or any one who has acquired a right to the estate from the idiot, or *non compos*, by contract, after the deed sought to be avoided. Of this there can be no doubt. "If a lessor grants his reversion, the grantee and lessee, are privies in estate; privies in contract, extend only to the persons of the lessor and lessee, and where the lessee assigns all his interest, here the lessor and lessee remain privy in contract, but not in estate, which is removed by assignment." Jacob title privies, and 3 Co. Rep. 23.

It is evident to us, from these extracts, if there were no other reason for it, that when the cited books speak of "privies in estate," they do not mean to include as privies, the vendor and his immediate vendee. And these authorities also shew, that a purchaser or devisee, holding his right *from* the infant or *non compos*, derived after the attainment of legal discretion, or restoration to sanity, may avoid a deed made for the same estate, during disability. Without these authorities we should be of this opinion; and decide, that the cases which have declared, that privies in estate cannot avoid, apply only to those between whom and the infant or lunatic, there is only a privity of estate, and not a privity of contract. There is no reason, why a purchaser, from a person who had conveyed the same estate previously, and when an infant, shall not have as much right to avail himself of the disability, as the heir or executor of the infant has. Indeed there is

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plainly much reason for his having a stronger right. *He* has paid the value of the estate; *they* have given nothing. If he had not bought it, they might have reclaimed it from the purchaser from the infant: or the infant might have obtained a restitution himself. By his purchase after the removal of the disability, he has given the value of the estate to his vendor and which enures to the benefit of his heirs and personal representatives; as they might have recovered the estate, if he had not bought it, and have virtually done so, by receiving from him its value, why should he not hold it? He certainly has as good a right to it, as if the heir, or his ancestor, had expressly avoided the deed made during infancy, and afterwards sold it to him. Besides, the deed to him, conveys all the right that the vendor had. As the vendor had a right to avoid the former deed, certainly the vendee has acquired the same right. *Why should not such a purchaser, have equal rights with a second mortgagee, an assignee, or a creditor?* Moreover, the last deed, made after the infant was 21, avoids that made during infancy. An infant must, while an infant, avoid an act done in a court of record; but an act "*in pais*," can only be avoided effectually after he is 21; because, when he becomes 21, he may confirm it, although, before, he may have attempted to avoid it. How is an infant, to avoid a deed? Certainly after he attains the age of 21, he may, by any act, expressing his assent, confirm; and of course an act done, after 21, of as much solemnity and dignity as the deed, evincing his disaffirmance, will necessarily have the effect of avoiding it. And this is expressly so decided in the case cited from 14 Johnson.

An infant can only avoid an act done of record pending infancy; otherwise as to acts *in pais*.

Any act after 21, disavowing or dissenting from a deed, delivered during infancy, of equal solemnity with the deed, annuls and avoids the deed.

If therefore the deed, made after the disability, shall have been removed, *per se*, avoids one made to another before its removal, the vendee in the last deed can hold the estate conveyed to him, by shewing the fact, that when the first was made, a disability existed, which rendered it voidable; and for which it has been avoided by a subsequent deed to him, and he must therefore hold the estate, unless the other can shew a confirmation before the date of the last deed. *This alone, is decisive.* And this too is positively asserted by Blackstone, in one of the foregoing extracts.

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There is another consideration to prove, that the vendor and his vendee, are not considered as privies in estate, in the sense which that term is contended by some, to have, in the cases which affirm that privies in estate cannot avoid.

Whenever a suit is brought, on the mere privity of estate, it is local. And it has never been intimated, that a suit by the vendee against his vendor, is local. It is undeniably transitory. It is a suit on the contract, and not on the privity of estate. But the same authorities show, that suits by privies in estate are local. Therefore, the conclusion is inevitable, that when they say that privies in estate cannot avoid the deeds of infants, &c., they mean only such as those mentioned by them, to-wit: the lessee and grantee of the reversion, the donor and the remainder man, &c., &c., who acquire no right *from* the infant or *non compos*, do not represent him by contract, are not his substitutes; but hold and claim, either by operation of law, or by the gift or grant, in which the infant or *non compos*, has had no active or voluntary agency.

The lord, by escheat, does not claim by any act or contract of the deceased holder. He does not derive title from him; nor does the remainder man, nor the grantee of the reversion, hold from the tenant of the particular estate or the lessee, by any contract with them, or in consequence of any act done by them. Between such parties, there is no right excepting what results from mere privity of estate, or of law, and therefore some are called privies in law, and some privies in estate. They are not privies in contract or in representation, as the purchaser is. And we have been unable to find any case, which intimates that a subsequent purchaser may not take advantage of the infancy of his vendor, and by pleading the disability, avoid the estate, conveyed by the infant to another, when the vendor laboured under a disability, which rendered it voidable.

Hence, we conclude, that the apparent discrepancies, in the authorities on this subject, do not in fact exist, or may be easily reconciled. And therefore concur in the opinion, in 14 Johnson, that a purchaser may

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avoid the deed which his vendor might avoid; and that, by conveying to him, the vendor for himself, has avoided it. This opinion in Johnson, is, we have no doubt, sound law, although the reason for one branch of it, is misconceived. But it may be said, that lunatics cannot stultify themselves; and therefore, cannot, like infants, avoid their deeds; and consequently, that purchasers from them, cannot avoid them.

This is specious, but no more. Whether a person *non compos*, may or may not plead his disability, is, in our opinion, yet a "*questio vexata*;" which, without any violation of our judicial duties, we might decide either way. The reason and equity of the case, are on one side; the weight of more ancient authority on the other. But the hard and arbitrary interdiction, enforced by some ancient dicta, and acquiesced in, by some more modern cases, and in Kentucky too, has been relaxed, where it originated, more and more, as light has been diffused; and the only question on this point, would be, whether the doctrine, is so inflexibly settled against the lunatic, that "*nolens volens*," we shall be bound to recognize it as the fixed law. This we shall not now decide, because it is not necessary to do so in this case.

Deed executed and delivered by one, when *non compos*, may be avoided by purchaser during lucid interval, tho' vendor still alive.

Whether a *non compos*, can avoid his own deed or not, his heirs and representatives may. And we see no reason why a *bona fide* purchaser from him, may not. The equity and reason of the privilege, apply to a purchaser, as well as an heir. Although the lunatic may not be permitted to benefit himself, by disaffirming a deed, made by him, under mental disability, his subsequent deed to a purchaser, after a recovery of sanity, indicates his dissatisfaction with the former one; and although it may not, as in the case of infancy, avoid the first deed, it vests, in another, as much right to do it, as the heir can possess. And the authority of one of the extracts from Blackstone, seems decisive on this point. For the expressions "heir, or *other persons interested*," can mean nothing else, than the heir or other person, who shall have acquired from the *non compos*, an interest in the estate conveyed.

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We are therefore of opinion, that the appellee in this case, as purchaser, has the same right to plead the lunacy of Walter Beall, as the heirs of Walter Beall would have.

The mortgage of W. Beall, of 1802, reciting that of 1801, indicates assent, and operates as a confirmation, he being then *sane*.

But can such a plea, be availing to either the heirs or purchaser? It cannot; because the deed to Breckenridge, in 1802, (when it is admitted, that W. Beall, was not disabled) is a confirmation, by Beall, of that made in 1801; and Ormsby's is posterior in date, to-wit: in 1804. Any *act*, which shews assent, especially a recognition in a subsequent deed, which (as that of 1802 does) refers to, and describes the voidable one, in a manner to evince an acquiescence in it, is a valid and irrevocable confirmation. Bac. Ab. title Infancy. 15 Mass. Rept's. 220; Gilb. Ten. 75; 11 Johnson's Reports, 542; Reaves's Dom. Rel. 240; Philips vs. Green, Man. of C. Appl's.

Parties and privies to a deed, are estopped by recitals in such deed. P. B. Ormsby a purchaser, with notice.

Beall's heirs and all claiming under him, by purchase, since 1802, are estopped, by the recital in the deed of 1802, from pleading his lunacy to avoid the previous deed of 1801. The mortgage of 1802 recites, that, that of 1801, is given for the same property; states that it is sufficient for the payment of the debts to be secured by each; and certainly is an effectual waiver of all right to avoid the first. Besides, as each deed was executed to Breckenridge, whenever the estate is sold, at his instance or that of his representatives, to satisfy the first mortgage, all title passed by the deed of 1802, to Breckenridge, enures to the purchaser under the decree. For Breckenridge cannot sell the estate to pay one debt and still hold a lien on it to secure others. The whole title is sold; and title is an unit. The alleged lunacy of W. Beall, therefore, in 1801, cannot benefit Ormsby, by enabling him to avoid the deed of 1801. And he cannot complain; because he had, when he purchased in 1804, either actual or legal notice of all the mortgages; and certainly had notice of them, when he purchased, at the commissioner's sale, the same property the second time.

Willingness at one time,

The fact that the appellants were willing, when the first decree was rendered directing the sale, to accept

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Commonwealth's paper, cannot benefit Ormsby. They had to get another decree, and that directed the sale to be for specie. The creditors were under no obligation to take bank paper. The sale is good.

to receive com'tha. paper, which is not delivered, does not bind afterwards.

Nor can any alleged defect in the proceedings in the suit for foreclosing the mortgage, benefit Mr. Ormsby. Waiving the very questionable attitude in which he presents his claim for relief, after an unsuccessful attempt to avoid his purchase under the decree, in the circuit court, pending the suit in chancery; the fact of his making the purchase on such a judicial sale, and the additional circumstance, that his property, after judgment on his bond for the price bid by him, has been sold to satisfy that judgment; nevertheless, without any of these objections to the relief sought by him, which would be very cogent, the decree which he seeks to avoid, opposes an insuperable barrier.

The defect, if any, in the proceedings of the Fayette circuit court, not to be examined in this case, collaterally and incidentally.

If the court had jurisdiction, and such parties were before it, as to enable it to decree at all, no defect of parties or other irregularity, can authorize this court or any other, incidentally to call the decree in question, or consider it in any other light, than that of a final and conclusive decision between the parties to it, until it shall be reversed by the appellate court, in a direct proceeding for that purpose. Nothing appears which can show want of jurisdiction in the circuit court of Fayette.

The service of process, in a county, and the acknowledgement of service, sufficient evidence of residence to give jurisdiction on a bill to foreclose, as the proceeding is, *in personam* as well as *in rem*.

It is true, if none of the defendants resided in Fayette, as the mortgaged property was elsewhere, the court would have no jurisdiction of the case. But unless both the realty and the persons were out of that county and fixed in some other, the court had jurisdiction. A bill to foreclose is *in rem* and *in personam*. And either the thing or person of the defendant gives jurisdiction. Now, although the fact may be, that none of the defendants resided in Fayette, it does not necessarily so appear in the record. Process is executed on one of them in Fayette. And there is no evidence in the case which would authorize this court to decide judicially, that Samuel Beall, on whom the sheriff of Fayette served a *subpœna*, or Norborne B. Beall, who acknowledged service, (and both of whom answered,) were not resident in Fayette. The an-

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swers do not deny the jurisdiction on any such ground; nor could the plea of residence be material, unless the Bealls had been served with process out of Fayette. BRECKENRIDGE'S H'RS vs. ORMSBY.

There were certainly, both complainants and defendants enough to make a case fit for adjudication; and although there may be others who might, and perhaps ought to have been made parties, and although, for this defect, the decree might possibly be liable to be reversed, such a defect is not sufficient to invalidate it, in the collateral and indirect mode attempted.

Omitting to make the trustees of S. Beall def'ts. no error.

It would have been more regular to have made the trustees for Samuel Beall, defendants. But this was not necessary. Because: First. They were only nominally interested, the beneficial interest being in Beall's heirs, who were defendants. And, Second. The time which had elapsed from the date of the trust and the tacit admission of Beall's heirs, that it had been fulfilled, are sufficient to authorize the presumption that it was extinguished. S. Beall's heirs are, at all events, estopped now to set up any claim under the trust, and of course, that deed cannot render the right of Ormsby more insecure than it would be without it; Bul. ni. pr. 110; 3 Bro. 289; 3 Pr. Wm. 287; 7 Johns. Repts. 283; 3 Ib. 386; 12 Ib. 242; 5 Johns. Cha. Repts. 552.

Breckenridge's heirs not being parties, does not *nullify* the decree.

It would also have been more regular, to have made Breckenridge's heirs parties. But this omission cannot render the decree a nullity. The mortgage was only a collateral security. Any thing that assigns or extinguishes the debt, transfers or discharges the mortgage deed; 2 Marsh. 109; 2 Burrow, 978; 11 Johnson's Repts. 534; 15 Ib. 319.

Where a mortgage is paid off, no release is necessary to reconvey the title to the mortgagor; 18 Johnson, 7; and it would seem from this case, that it is not essential that the payment should be before breach of the condition.

The payment of a mortgage debt, whether before or after, forfeiture extinguishes the debt, and

A payment of the mortgage debt extinguishes the mortgage, at law, as well as in equity. The mortgage is but a chattel interest. The right to the money passes to the personal representative of the mortgagee, and his receipt of the debt, is good against the heir. The wife of the mortgagor is dowable, and the wife

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the title vests in mortgagor, or purchaser from mortgagor, without release or reconveyance.

of the mortgagee is not, even after forfeiture. The estate mortgaged may be sold to pay the mortgagor's debts, but not for the debts of the mortgagee. *The debt cannot be seperated from the mortgage.* The mortgagee, after forfeiture, may maintain an ejectment against the mortgagor to recover the possession of the estate mortgaged. *that he may have the benefit of the profits.* But the legal title, *pro forma*, is vested in the mortgagee after forfeiture, *for the sole purpose of securing his debt.* He cannot sell or assign the estate without parting with the debt; and it seems to result, necessarily, that by an extinguishment of the debt, *ipso facto*, the perfect legal title relapses to the mortgagor. It is not doubted that a payment of the debt, before forfeiture, extinguishes the mortgage at law. But there are many learned judges who doubt whether a payment after forfeiture, will have the same effect. On this point there is great diversity in the cases reported, as well as in the "*auctoritas prudentum.*" But ever since the days of Hardwick, the opinion has grown more and more prevalent, that a payment, at any time before the title has been passed to the mortgagee, by a decree or sale, will *per se* at law, as it will in equity, divest the mortgagee of all title. In support of the foregoing propositions, see 4 Johnson's Repts. 42–3; 2 Bur. 969; Douglas, 630; Ib. 455; 6 Johnson, 294; 7 Ib. 278; 10 Ib. 381; 7 Massachusetts Repts. 139; 5 Johnson's Cha. Repts. 552–570–454; Tullee, 185–6; Powell on mortgages, 683.

A stranger cannot set up the title of a mortgagee as an outstanding title; 6 Johnson, 290; 7 Ib. 278; 10 Ib. 381. A conveyance by the mortgagor, with covenant of seisin, before foreclosure, or possession taken by the mortgagee, is no breach of the covenant in his mortgage; 7 Johnson, 376. The mortgagor in possession may maintain trespass against the mortgagee for an entry on the mortgaged estate, after forfeiture; and if the defendant plead *liberum tenementum*, the mortgagor may reply that the freehold is in him; Runyian vs. Merserean, 11 Johnson, 534.

The foregoing propositions, which are affirmed and undeniably sustained by the authorities which we have cited, leave us no just ground for resisting the conclu-

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sion that a payment of a mortgage debt, whether before or after forfeiture, is in law, as well as in equity, an extinguishment of all title in the mortgagee to the estate mortgaged; and that, consequently, no reconveyance in either case, by the mortgagee or his heirs, is necessary to perfect the title of the mortgagor, or of a purchaser under a decree of foreclosure and sale. Either a payment or a sale by decree, would seem sufficient. If we are mistaken in some of the reasons for this opinion, still as the executor of the mortgagee has a right to the debt, if he sue in chancery and obtain the amount of it, by sale of the property, the heir is bound, because he is represented, "*quo ad hoc*," by the executor, and it would, therefore, seem that the title of the heir passed.

The mortgagor may maintain a bill against the mortgagee or his heirs, for a release or reconveyance, after payment. But this is not because the payment is not an extinguishment, but only because the fact of payment may not be, at all times conveniently susceptible of proof without written or record evidence. Such a bill in such a case, is filed as a precautionary measure. But the fact of payment is sufficient, if it can be made to appear, without a reconveyance, particularly if it be manifested by a decree of court.

In this case, the final decree which will be rendered, and the former decree, under which the lot was sold, will be ample and indisputable evidence of the payment of the mortgage debt, and the consequent extinguishment of the title of Breckenridge's heirs. The executors of John Breckenridge have a right to receive the money. The heirs not only assent to their receiving it, but in this suit insist on it. If, therefore, they could have any legal right to the lot after the payment, they have waived it, and will forever be estopped by this record, from asserting it. We are, therefore, of opinion that Breckenridge's heirs were not necessary parties, although it would have been more proper, for the prevention of future contests or doubts, to have made them parties.

But if we shall be mistaken in this opinion, nevertheless, the decree was not a nullity, and cannot be dis-

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regarded by the court in this case. If Ormsby's title would not be secure without a conveyance by Breckenridge's heirs, still the sale should not be cancelled, unless it could be shown that he could not procure such a conveyance. He would only have had a right to go into chancery to obtain a release by the heirs. As, therefore, in this suit, in which they are parties, they seem to waive all pretence to any claim to the mortgaged property; and as a reconveyance may be decreed if desired, so as to remove the most fastidious objection to the title of Ormsby, no ground is furnished in any aspect of the case, for perpetuating the injunction. If Ormsby desire a release by the heirs, he can have it, and then there could be no objection to enforcing his contract of purchase.

Decree and mandate.

The decree of the circuit court is, therefore, reversed, and the cause remanded with instructions to dissolve the injunction, and decree a release by Breckenridge's heirs, if Ormsby ask for it. But as he did not file his bill to obtain title, nor complained in it that he could not get it, and as he has, in our opinion, all the right that ever vested in W. Beall, or J. Breckenridge, and as good an one as Breckenridge's heirs can make to him, he must pay the costs in this and in the circuit court.

Wickliffe and *Chinn*, for appellants; *Haggin* and *Crittenden*, for appellees.

Messrs. Haggin and Crittenden, counsel for the appellee, presented to the court, a petition for a re-hearing.

Petition for a re-hearing.

The object of this petition is not to controvert the general doctrines established by the very learned and able opinion delivered by the court in this cause, but to suggest, as a ground for further consideration, some matters which, amidst the variety of questions presented by the record, seem to have escaped the attention of the court, and which the counsel for Ormsby believe will have a material and decisive influence in the issue of his cause.

Our object shall be rather to suggest than to discuss; trusting more to the reflections of the court, than to our own arguments.

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Ormsby, as a subsequent purchaser, attempts to impeach and invalidate a previous mortgage, executed by Beall to Breckenridge, in the year 1801, alleging the insanity of Beall, at the date of that mortgage. Upon this aspect of the cause, the court has decided, that the deed of an insane person is not *void*, but *only voidable;* and that a subsequent purchaser, standing in the attitude of Ormsby, has a right to impeach and avoid it. But that, in this case, if Beall was insane at the date of that mortgage, (a question, on which no opinion is given,) yet, that it is confirmed and made unavoidable by the recitals of it, in a subsequent deed of mortgage, to secure other debts, made by Beall to Breckenridge, in the year 1802; at a time, when, as the court say, there is no allegation of his insanity. And upon this part of the case, the decision of this court has been made to turn against Ormsby, upon the supposed confirmation of the mortgage of 1801, by the mortgage of 1802. If the facts upon which this decision is predicated, had been properly ALLEGED AND *proved*, the correctness of the decision would probably have been unquestionable. But it is respectfully suggested and insisted, that the very fact upon which the decision has been made to turn, is not *alleged* in the pleadings of the parties, even if it can be considered as proved. The ground relied upon by Ormsby, for relief, in this particular, is the insanity of Beall, at the date of the mortgage of 1801. This is directly alleged in his bill, and is directly denied by the answers of the defendants, who insist that he was sane at that time. Thus, then, the issue is fairly and distinctly made upon the sanity or insanity of Beall, at the date of that mortgage. Upon *that issue*, the parties have, on both sides, prepared themselves with testimony, and on *that issue*, the parties have mutually staked the cause. There is not in the bill of Ormsby, nor in the answer of the defendants to it, any *allegation* of any *subsequent ratification or confirmation* of the mortgage of 1801; nor is there in those answers, the *slightest allusion* to the deed of 1802, now relied on as amounting to such a confirmation. If the deed of 1802, or any other act of Beall, had been intended to be urged, and relied on as a confirmation, the defendants ought to have explicitly *alleged* a confirmation, and thereby afforded to Ormsby

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the opportunity of investigating and repelling such a defence. This they have not done, but turning aside from the issue taken upon the insanity of Beall, at the date of the mortgage of 1801, they attempt, for the first time in this court, to surprise Ormsby by a new and different defence, of which they had given no warning in their answers.

If the deed of 1802, had been alleged, and the defendants in their pleadings, had insisted upon it, as a confirmation of the former mortgage, this court cannot know, or anticipate, but that its effect on this case, might have been successfully obviated, and the deed itself, shown to have been void or inoperative. But admitting the deed to be operative, and to be *proof* enough of a confirmation of the previous mortgage, ought not the defendants to have *alleged* a subsequent confirmation by Beall, in order to render that *proof* admissible or availing?

It is a settled maxim, that the *allegata* and *probata* must agree. And our own court of appeals has said, that it was just as improper to permit a party to recover upon a case *proved* but not *alleged*, as upon a case *alleged* but not proved. The same principle applies to defendants, and equally requires the agreement of their *allegata* and *probata*, to sustain a defence. It is altogether unnecessary to give illustrations of this doctrine, or to make a parade of authorities in support of it. It is no where better known or established, than in this court. And even the uniform current of authorities, upon which it rests, will not more certainly secure for it, the sanction of your honors, than will its own intrinsic propriety and justice.

The deed of 1802, no otherwise appears in this cause, than as part of the record of the former suit in chancery, brought by Breckenridge's administrators, in the Fayette circuit court, and which record is referred to by both complainant and defendants in this suit. But by neither, is there any reference made to that deed, for any purpose. Nor is the reference to the record of that suit, made for the purpose of raising or affecting any question touching a ratification or confirmation of the mortgage of 1801. It is referred to by Ormsby, not to increase its effect upon him, or to ac

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quiesce in, or submit to it, but to show the correctness of his allegation, that the decree pronounced in it, was a mere nullity, by reason of the irregularity of the procedings on which it is founded. It is referred to by the defendants, for the supposed conclusive effect of its *decree*, upon some of the matters of equity, alleged by Ormsby.

But it is considered as very certain, that the reference which is made to that record, cannot be regarded as equivalent to an allegation of the confirmation of the mortgage of 1801. By no magic or conjuration can such an allegation be considered as implied in such a reference; and if, by any strained construction, it might, the court would not allow such obscure and occult implications, to supply the place of those plain and direct allegations, by which parties litigant ought to warn each other of their several matters of complaint and defence.

In the suit in Fayette, no question was made about the insanity or sanity of Beall; about the validity of the mortgage on that ground, or about subsequent ratification. As to all these matters, that case was totally silent; Ormsby was no party to it; Ormsby then, cannot be affected by the decree or evidence in that cause, so far as it relates to the issue formed in this, as to the insanity, &c. of Beall. But, at any rate, the record referred to, can only operate *as evidence*, on the issue alluded to, and be available so far, and so far only, as there are allegations for it to agree with. And we repeat, that there is no allegation by the defendants that the mortgage of 1801, was ever thereafter ratified or confirmed by Beall, and consequently that all *evidence* to that effect, must be unavailing; and the more especially if that evidence be of a character (a deed, for instance, as it is here,) which, by the rules of pleading, in law and equity, ought to be specially alleged.

If this view be correct, and the counsel of Ormsby has great confidence in it, it must exclude all consideration of any subsequent confirmation of the mortgage of 1801, and must leave the validity of that mortgage to depend and be decided exclusively upon the ground of the sanity or insanity of Beall, at its date. And upon that question, not yet decided by the court, the

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most entire confidence is felt, that your honors will be of opinion that the insanity of Beall is firmly established; and that on that side, there is a decided preponderance in the number of witnesses, and in the weight and intelligence of their testimony; and consequently, that the mortgage ought to be declared void.

If, however, there should be doubt that Beall was utterly incapable of rational exercise, at the date of the mortgage; or if it should be held, still, that by some technical rule the latter deed must enure a confirmation, yet because of the extreme imbecility of intellect, on the part of Beall, and the unfairness in obtaining the mortgage, by Breckenridge, the deed should be canceled. Breckenridge had no just or plausible pretext for demanding this mortgage. On the first of March, 1798, Breckenridge sold to Beall and Nicholas, his interest in the Slate furnace and the contiguous lands, without responsibility as to the title. Beall was to let Breckenridge have a tract of 1000 acres on Bear Grass, and 600 acres on Drennons Lick creek, purchased from Samuel Beall. Breckenridge was to obtain the title from Sam'l. Beall's representatives, for which, in the words of the agreement, "Walter Beall will not be answerable in any manner whatever, except that he will possess Breckenridge with an agreement entered into between him and Samuel Beall, whereby the said Breckenridge, in case of deficiency of title, may avail himself of all advantages by said agreement." Breckenridge afterwards received the promised writing on Sam'l. Beall, gave his receipt accordingly, and in truth obtained the patent in his own name. Walter Beall then had, in every thing, fulfilled his covenant with Breckenridge, and stood absolved from all liability to him. Yet, at a period when all his neighbors and friends look upon him as laboring under the heaviest affliction, the utter loss of reason, and none could fail to observe considerable derangement, this mortgage was obtained to secure the payment of £1000 in land, the mortgagee executing a bond for the conveyance of the 600 acres of land on Drennons Lick. None can doubt of the consideration; and as little cause remains to question, that it was entirely the art of that mortgagee. How did it happen that the parties met at Bardstown? that this transaction, now fairly and finally

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closed, should again be opened; that Beall should become the purchaser of the six hundred acres of land, and at the round and enormous sum of £1000; that he should execute a mortgage to secure the price before he received a deed, and employ a lawyer, at the same time, by bond, as a mere courtesy, to investigate the title to this newly acquired estate? What participation had Walter Beall in this contract, at a time when he did not associate with, or recognize a friend, himself, but the subject of their sympathy? When, in the language of some of the witnesses, he was incapable of settling the account with his butcher. But the right of Ormsby to impugn this deed is denied. Surely this is without authority. He was the innocent and *bona fide* purchaser and improver of the lot, which would be incumbered by this fraudulent instrument. If both the parties to the deed had contemplated a dishonest purpose, the cases are numerous to show that such a purchaser could avoid it in chancery. And with equal propriety may redress be sought against the *one*, whose contrivance would prejudice. The opinion delivered shows, that at law, this is often the privilege of privies. In chancery, more confidently would it be expected. Were it an absolute deed, fraud would annul it. It is but a mortgage, a charge upon the estate, which is well subject to subsequent mortgage or sale, and to redeem against which, is every days practice, upon the application of privies. The cognizance of the court once attaching, its scrutiny must not stop.

Touching the question, whether this deed of mortgage is void, or voidable, we have expressed our apprehensions, and indeed it would seem presumptuous in counsel, to hope to change an opinion formed upon deliberation, and investigation, so profound as the present. Yet they would be permitted to suggest, that they have long looked upon the conveyance by livery of seisin, accompanied with a deed of feoffment, declarative of the intent, as the most solemn and conclusive act in law, of which parties to a contract, were capable in the country. Therefore, that conveyance should stand, notwithstanding most disabilities, until deliberately avoided. All other conveyances by infants, &c., were void, and such they think, is the receiv-

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ed opinion of the profession generally. It is very probably, the misfortune of the counsel, that they are yet unable to understand the rule given by Perkins on this subject, as the court expounds it. That author, certainly intended to discriminate, between deeds which took effect, by delivery of the hand, and those which took effect by the delivery of the deed. The former he pronounces voidable only; the latter void. The deed of feoffment, does not necessarily, nor did it originally contain a granting clause. Its province was to perpetuate evidence of the intent of the conveyance, the title passed by livery, or delivery of the hand. But the deed of lease and release, took effect from the delivery, by delivery of the deeds. Therefore, that was once the most ordinary mode of conveyance. But under the operation of our statute, the deed of bargain and sale superseded as a conveyance, that of lease and release, and indeed all others. Perkins speaks of the common law rule. He makes a distinction between a delivery of the *hand* and of the *deed*; that he says, is the test by which the effect of the conveyance is to be determined. And yet the opinion says, that proves, that all deeds which take effect by delivery of the *deed* are voidable only. If Perkins meant *deed* and *hand* as synonymous, the conclusion of the court is right; if he did not, then the contrary inference, it would seem, were inevitable. If such was the intention of Perkins, his labor for all practicable purposes was vain. For he makes a *distinction without* a *difference* and at last leaves us without a rule. And in this condition lord Mansfield found himself. And he was consequently reduced to the necessity of adopting another rule, to ascertain what acts of an infant were void, and what only voidable. If the infants contracts, are to his benefit, they are only voidable, if they are to his prejudice they are void. And here full scope is given to our benevolence. But *we* are without a guide. Now concerning the handcuff and the shield, and the policy of infants to trade and speculate, binding others, themselves free, &c. It had seemed to us, that the law did not will, or expect, that infants should contract, because they were supposed to lack discretion. Therefore their contracts are generally denounced. They are not bound. But as they must live, and receive in-

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struction, &c., and that they may labour under no disadvantages in their contracts, on those subjects, they are at liberty, thus far to bind themselves. So far as the law deemed it, to comport with their interest, or comfort, they were placed upon an equality with the adult. But where it is deemed inexpedient, that they should act, the law denounces; mostly, we acknowledge, to the prejudice of the adult, but to suppress the practice. And we should have apprehended, that any facilities or encouragement to the infant, to speculate upon the means of others, reserving to himself the liberty of rendering an equivalent at his own good pleasure, upon the attainment of full age, comported neither with the justice, the policy or the morality of our institutions; and was not "as it should be." We have never investigated the question, that we might negative the supposed analogies, between lunacy, and infancy in law; although we are very conscious of a diversity in many things. We had confidently relied, that were this a case of infancy, the mortgage would be held void; and now tested by the rule given by Mansfield, we would say that a mortgage upon his land, even to secure payment for necessaries by an infant, is void. By every test, the infant has no power to mortgage his land.

Petition overruled.

Cates and Locker vs. Wooldridge.

INJUNCTION BOND.

Case 60.

April 17.

Appeal from the Christian Circuit; B. SHACKLEFORD, Judge.

Injunction. Practice. Pleading. Bar. Statute.

Judge UNDERWOOD delivered the opinion of the Court.

Statement of the case.

THE appellee instituted a suit against the appellants on an injunction bond. A demurrer was filed to the declaration; the plaintiff confessed the demurrer and amended his declaration. The record before us presents three pleas, one is in substance, that the injunction was not dissolved as alleged in the declaration; and one other in substance alledges, that since the institution of the action upon the injunction bond, another injunction had been granted, enjoining the collection of the judgment at law; which last injunction was still pending, in full force and undecided.

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CATES, &c. vs. WOOLDRIDGE

This last plea, is plead as a bar to part of the declaration only, to-wit: to that breach which goes for the recovery of the amount of the judgment at law. Neither of these pleas are noted, as filed by the clerk, or entered on the order book as filed. That which denies a dissolution of the injunction, commences with this language, "and for further plea in this behalf, the said defendants say," &c, the other begins in these words, "and the said defendants, by their attorney, come and defend the wrong and injury," &c. from which it may be inferred, that the plea denying the dissolution of the injunction, was intended to be numbered as the second plea, and the other as the first. The record states that the plaintiff filed a demurrer to the first plea of the defendants, which was sustained by the court. The record then states that the defendants filed the plea of conditions performed; on which an issue was made up, a trial had, and verdict and judgment given for the plaintiff.

Assignment of errors.

The assignment of errors complains, 1st. That the court erred in sustaining the plaintiff's demurrer to the plea. And, 2nd. That the court erred in giving judgment for the plaintiff, without, in any wise, disposing of one of the defendant's pleas.

Requisition of the 30th sec. of the act of 1810. If the clerk fail to note a plea filed; yet, if the record prove such plea to have been acted on, the court will consider it.

It is required by the 30th section of the act to regulate proceedings in suits at law and in chancery, approved, 31st of January, 1810, that clerks should endorse on every plea, the time when it was filed, and to enter on the order book, that such plea is filed; but it is not necessary to copy it on the order book. If a clerk omits to perform the duty thus enjoined, and "the record evinces that other acts have been done, in the progress of the cause, substantially answering the same purposes," this court can regard the pleas as was decided in the case of Miller and Dennis vs. Foley, 4 Bibb, 200. The record states that a demurrer was filed to the first plea; this was such an act, done in the progress of the cause, as would induce us to regard the *first* plea, if we could ascertain which was the *first* plea, although it has not been numbered or noted as filed, in any manner, by the clerk.

Plea, denying

If the demurrer could be considered as applicable to the plea, denying the dissolution of the injunction,

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as alleged in the declaration, we should not hesitate to reverse the decision of the court below, in sustaining the demurrer, for that plea is unquestionably good. No cause of action could accrue on the injunction bond, until the injunction was discharged or dissolved. That fact was necessarily averred, to show a cause of action, and might properly have been put in issue. But there is nothing in the record which can induce us to apply the demurrer to that plea; on the contrary, the language of the plea already quoted, and the manner in which the demurrer has been set out, seem to connect it with the plea, seting forth the obtention of the second injunction. That plea is not a valid bar to any breach assigned in the declaration. All the events had taken place according to the averments in the declaration, which, under the stipulations of the injunction bond, entitled the plaintiff to recover. By this plea the defendants would, in effect, amend the condition of their bond, without the assent of the plaintiff, and make the payment of the money depend, not upon the dissolution of the injunction mentioned in the bond, but upon the dissolution of that injunction and *all others which might be at any time obtained.* There is no principle to justify us in giving such an effect to the injunction bond. The plea was, therefore, not even a partial bar. It is not necessary to decide what remedy chancery could afford, in suspending the collection of part of the judgment, which may be rendered in a suit upon an injunction bond, where a second injunction, staying proceedings on the judgment at law has been obtained. Regarding the plaintiff's demurrer as applicable to this plea, it was, therefore, properly sustained by the court.

the dissolution of injunction, bar to an action on injunction bond. Plea, that a second injunction had been obtained, no bar.

But it was the duty of the defendants to have their pleas properly endorsed and filed, and to show by the record that the court has inflicted a probable or certain injury, by rejecting or overruling the defences, relied on. Where this is not done, and the record, when brought up to this court, contains a copy of a paper, purporting to be a plea which was never noticed by the court below, and which was never so filed or entered, as to require the notice of the inferior court, we cannot regard it. Such is the attitude of the plea denying the dissolution of the injunction. There is good

If a paper appear in the record which has not been so noted, as filed, as to require the consideration of the inferior court, the court of appeals will not regard it. Duty of deft's

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SMITH'S H'RS vs. MITHELL'S.

reason to believe, that after the amendment of the declaration, that plea was intentionally abandoned; for the record of the Todd circuit court shows, that the injunction was dissolved as averred. There is no error in the proceedings of the inferior court, as charged in the first and second assignments of error.

to see their pleas properly entered and filed.

The trial having taken place on the plea of conditions performed, the case of Harrison vs. Park, decided at the present term, furnishes an ample response to all other questions presented for consideration, and shows that there is no error in the record.

The judgment of the circuit court is affirmed with costs and damages.

Crittenden, for plaintiffs; *Denny*, for defendant.

SCIRE FACIAS

Smith's heirs vs. Mitchell's heirs.

Case 61.

Appeal from the Montgomery Circuit; SILAS W. ROBBINS, Judge.

Revivor. Scire facias. Parties. Restitution.

April 18.

Judge ROBERTSON delivered the opinion of the Court.

Statement of the case.

WEATHERS SMITH obtained a judgment in ejectment, in 1810, against Mitchell, Craig and others, which was revived in 1820. In 1822 the judgment of revivor was reversed, because, as the whole judgment, as well for costs as for the term, was revived, the personal representatives ought to have been, but were not parties. In the mean time the heirs of Smith having obtained possession by a *habere facias*, and afterwards by another *scire facias*, revived the judgment, the heirs of Mitchell, after the reversal of the first judgment of revivor, sued out a *scire facias* for restitution of possession; which, after a full trial on a demurrer and several pleas, was awarded by the court. To reverse this last judgment, Smith's heirs have brought the case to this court.

Scire facias, for restitution admitted as a correct, tho' unusual mode

It is certainly very unusual to attempt a restitution of possession by *scire facias*. The usual and most appropriate mode is by motion. But we suppose that the mode of presenting the question, is not very essential, if it be such as will enable the court to try all the

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facts necessary to a correct decision. If all the requisite facts are of record, (as in this case,) we should incline to the opinion that a *scire facias* might be sustained.

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But the process should have been conformable to the right of the parties as exhibited by the record. And, therefore, all the persons who had been evicted ought to have been plaintiffs. Mitchell's heirs alone, could not prosecute a *scire facias*, on a record which shows that they are only a part of the defendants who had a right to be relieved, by the judgment demanded by them. As they thought proper to resort to a *scire facias*, they should have been required to proceed according to the established law in relation to such a remedy. And no principle is better settled than that a *scire facias* must correspond with the record.

When adopted, it must correspond with the record: all persons who had been evicted, should have been pl'tffs.

The court erred, therefore, in sustaining the *scire facias*.

It also erred in rendering judgment of restitution, after Smith's heirs had revived the judgment in ejectment, subsequently to the reversal of the first judgment of revivor. It is true that it is alleged that the *scire facias* which was issued to obtain this last revival, issued against only one of the original defendants, and Roseberry, who was asserted to be the tenant of Smith's heirs. It is equally true that neither the *scire facias* nor the judgment upon it, shows that the term had not expired. But these objections cannot prevail before this court now. The judgment is not a nullity by reason of the alleged want of adversary parties. The evidence tends to prove that Roseberry was not the tenant of the Smith's when the *scire facias* issued against him; and the sheriff, in his return of service on him, states, that he was *terre-tenant* of Craig, one of the original defendants in the action of ejectment. So far then, as the question of tenancy was concerned, the court had a right, on these facts, to revive the judgment in ejectment, as it did, in favor of Smith's heirs.

After the revival of a judgment in ejectment, subsequently to a reversal of first revivor: error to award restitution to defendants, plaintiffs having obtained possession by *habere facias*. The second revivor might be erroneous; until reversed it is obligatory upon the courts.

Restitution of possession is not a matter of course, after the reversal of a judgment under which it had been acquired. But whether there shall, in such a

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HAMPTON vs. DUDLEY.

Restitution, after reversal of judgment, not a matter of right; but dependant upon the sound discretion of the court.

case, be restitution, is a question addressed to the sound discretion of the court, on all the circumstances. Restitution should be awarded unless some good reason can be shown to the contrary. The facts, that it was conceded, that Smith's heirs held the superior title, had obtained a judgment thereon, were accordingly in the possession of the land, or by a judgment of revivor, unreversed and in full force, seemed entitled to the possession, might have been sufficient to justify a refusal of an order for restitution. The court which rendered the last judgment of revivor, could not disregard or resist it, however erroneous it might be. If it were right and irreversable, it would interpose an insuperable barrier to the restitution. It must be considered by the circuit court as right, until reversed. Besides, a restitution of possession to Mitchell's heirs, might do irreparable injury to Smith's heirs; and we see enough in the record to show that it would. A refusal to award restitution, could not materially injure Mitchell's heirs, because Smith's heirs were entitled to the land, and had been kept out of its use many years; and their judgment for execution was reversed on a technical ground, which does not affect the merits of their claim. The court ought not, therefore, to have felt itself bound to grant the restitution. A liberal and sound discretion might well have refused it; and we think that the court had no right to do otherwise, than refuse it in this case. The defect of parties, and the unreversed judgment of revivor alone, should have been conclusive.

Wherefore, the judgment of the circuit court is reversed.

Hanson and *Talbott*, for appellants; *Crittenden*, for appellees.

CHANCERY.

Case 62.

Hampton vs. Dudley.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Practice. Chancery. Damages. Judgment. Costs. Dissolution of injunction. Jurisdiction. Fraud.

April 20.

Judge ROBERTSON, delivered the opinion of the Court.

Statement of the case.

JAMES M'CRACKEN, being entitled, on settlement, to $100 in commonwealth's paper, from the

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trustees of Frankfort, for sinking a well for the use of the town, Jeptha Dudley, the treasurer for the board, on their order, executed to him the following note, (viz:) "Due Mr. James M'Cracken, one hundred dollars out of the town funds, &c. it being in part of certificate No. 71, to be paid according to seniority.

"J. DUDLEY, *Treasurer.*"

HAMPTON vs. DUDLEY.

Dudley's note to M'Cracken

This note was assigned to Hampton.

H. L. Mills, who assisted M'Cracken in the work on the well, filed his bill in chancery, against him and Dudley, charging, that he, (Mills,) was entitled, as partner with M'Cracken, to one half of the note, that M'Cracken was insolvent, &c. and praying an injunction to restrain Dudley from paying M'Cracken.

Mills's bill vs. M'Cracken.

Before either M'Cracken or Dudley answered, the court, on the motion of Mills, made an order directing Dudley to pay over to him the amount enjoined, which was $67, on the execution, by Mills, of a refunding bond.

Order of circuit court.

Afterwards, Hampton, as assignee, brought an action of covenant on the note against Dudley, and by default, on a writ of enquiry, having obtained the following verdict, (viz:) "We of the jury, find for the plaintiff, the debt in the declaration mentined, and one cent damages;" the court rendered in his favor, the following judgment, (viz:) "That the plaintiff recover of the said defendant, the sum of one hundred dollars, the debt in the declaration mentioned, with interest at the rate of six per cent. per annum, from the 29th of August, 1825, until paid, and the damages assessed by the jurors, &c. &c."

Hampton assignee, &c. sues in covenant upon the note, and has judgment vs. Dudley.

Dudley then filed his answer to Mills' bill, in which he set forth, that the contract with M'Cracken and the trustees, was for commonwealth's paper; that the order on him was drawn for paper; that the funds of the town were such paper, and nothing else, and so known to be by M'Cracken; that Hampton refused to accept commonwealth's paper in discharge of his judgment; that in consequence of the order of court, he had paid Mills $12, for which he exhibited Mills' receipt, and for which he prayed credit. He also prayed for an injunction against the judgment, and

Dudley's answer, and cross bill.

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HAMPTON vs. DUDLEY.

for final and general relief, and made Hampton and M'Cracken defendants to his answer, in the nature of a cross bill. The injunction being granted, M'Cracken and Hampton answered the cross bill, and required proof of all its material allegations. But every allegation of Dudley is abundantly proved, except the payment of the $12, of which there is no evidence, except a paper purporting to be Mills' receipt for it. Mills' bill abated by his death, and all its equity had been denied and seemed to be abandoned.

Decree of the court.

The court perpetuated Dudley's injunction for the $12, but dissolved it for the remainder, without damages, and decreed in his favor against Hampton, his costs.

Perpetuating injunction, as to $12, error, Hampton being no party to the order under which it was paid.

The decree for costs would have been right, if it had been proper to perpetuate the injunction for the $12. But in allowing this credit, the court erred. As Hampton was no party to the suit, when the order was made, no payment by Dudley under the order could affect his right to the whole amount of the note.

Dudley's only remedy for the $12, was against Mills on his bond, which he might have enforced in the suit in chancery, or might yet put in suit at law. The order was a very extraordinary one. But if it were allowable for the court to make it, Hampton cannot be in the slightest degree, prejudiced by it. If there had been sufficient evidence of the payment of the $12, the court erred in allowing the credit for it.

Party having complete defence at law, and neglecting to avail himself of it, can not apply to the chancellor for relief, unless he show satisfactory excuse for not defending at law.

There is no doubt that Hampton was entitled to no more than the value of $100 in commonwealth's paper. But can Dudley now be relieved in Chancery? We think not. He had all the means of relief, full and complete in the action of covenant against him. By proving that the town funds were commonwealth's paper, and proving the value of the paper, he would have been entitled to a correspondent reduction in the amount of the verdict and judgment. The note cannot, by any reasonable construction, be made to mean any more than that Dudley is to pay to M'Cracken, $100 in such funds as belong to the trustees. If these funds were specie, the $100 is specie; if they were commonwealth's paper, the $100 was paper, as much as if the note had been drawn expressly

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for such paper. Having ample defence at law therefore, Dudley cannot ask relief of the chancellor, unless he had shewn some good reason for not making his defence at law. This he has not attempted to do. It was therefore right to dissolve his injunction, so far as this ground of equity was concerned.

LILLARD vs. FIELD.

It would be hard that Dudley should pay the nominal amount in specie. But he ought to have made the proper defence at law. The judgment cannot be resisted, as long as it shall remain unreversed. Whether it could be reversed or not, it would be premature and improper now to decide, or even intimate. But it cannot be controlled or modified by a suit in chancery, without proof of fraud, in obtaining it. If it be correct and irreversable, Dudley has now no remedy left for his extrication from its legal effects. If it be erroneous, its reversal, by writ of error to this court, is the only mode for avoiding or postponing its operation.

Erroneous judgment, so long as unreversed, obligatory and not to be controlled, unless for fraud in its obtention.

The court, therefore, erred in decreeing to Dudley, costs; and as Dudley had no right to go into chancery, the court ought to have decreed damages on the dissolution of the injunction.

Upon dissolution of injunction, he should pay costs and damages.

Wherefore, the decree is reversed and the cause remanded, with instructions to enter a decree, corresponding with this opinion.

Triplett, for plaintiff; *Haggin*, for defendant.

Lillard vs. Field.

DEBT.

Error to the Anderson Circuit; THOMAS M. HICKEY, Judge.

Case 63.

Usury. Pleading. Statute.

Judge ROBERTSON, delivered the opinion of the Court.

April 20.

To an action of debt brought in the Anderson circuit court, by Fields vs. Mark Lillard, on a note executed by him and Thomas Lillard, in 1825, for $908 13 cents, (Thomas Lillard being dead,) the defendant filed two pleas; the first was intended to relieve him to the amount of an alleged excess of interest, under the act of 1819, against usury; the second seems to have been drawn with the intent of barring

Pleas of the statutes of 1798 & 1819, against usury, to debt upon note for money.

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the action entirely; alleging that the note was given in consideration of a parol usurious loan of money by the plaintiff to T. Lillard, in 1818, on which the usury had been paid before 1825. Demurrers to these pleas were sustained by the court, and the defendant failing to plead over, judgment was rendered against him for the whole debt and legal interest.

The sufficiency of the pleas is the only question presented by the record.

Since 1819, defendant by proper plea, may exonerate himself from the excess of interest, over 6 per cent.

The first is too vague. It does not show enough to allow an issue for any precise sum, of usury, and a judgment by the court for the remainder. There is no doubt that any excess beyond six per cent. may be plead at law, to a suit on a bond for *a loan since* 1819. But the plea must be issuable and show on its face enough to enable the court to regulate the judgment between the parties, if the plaintiff does not reply. This is certainly not such a plea. It is uncertain and indefinite. It does not show how much credit defendant claims, and, therefore, is bad; 18 Johnson, 28.

Plea that a note executed in 1825, was, upon a usurious contract, by parol, in 1818, no bar to the action since the statute of 1819: nor before, unless the usury contaminated the note, by making part of the sum.

The second plea is also defective. If the consideration of the note were money usuriously loaned before the act of 1819, that fact, properly averred, would not be a good legal bar to the whole action. The act of 1819 does not touch contracts made before its passage. The statute of 1798, declared that all usurious contracts should be void. But it has been decided by this court, that a note given since 1819, in consideration of an usurious loan, made before the act of 1819 took effect, may be enforced, for principal and legal interest due on the usurious loan. And even without the act of 1819, an usurious contract could be purged by agreement.

The supreme court of the Union, in the case of De Wolf vs. Johnson, 10 Wheaton, 367, has decided that an usurious contract may be cleansed, by a new contract which drops, or does not contain any taint of the usury; and such also was the decision of this court in the case of Postlethwait vs. Garret, 3 Monroe, 347; in which it is decided, that a new bond which does not include the usury or otherwise reserve it, is good although the usury had been before received and re-

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tained by the lender. These decisions were under the act of 1798.

This doctrine is so well settled by these and many other authorities, that although an usurious contract under the act of 1798 is void, nevertheless this court cannot, if disposed, disregard what must be received as established law.

The second plea does not aver that the bond includes any of the usury which had been reserved in the loan of 1818. It shows that it does not. For it alleges that the usury and a portion of the legal interest had been paid. If, therefore, this bond had been dated before the act of 1819, it would not have been liable to impeachment by such a plea, for usury reserved and paid before its date. But would have been invalid only for reserving, prospectively, more than legal interest. As the act of 1819 only bars a recovery for the usury on contracts of loan made after its date, a plea of usury to a suit on such a contract, could not bar the whole action. The second plea in this case, considered as a plea in effect, to get clear of the usury and not to bar the action, is liable to the objections which have been deemed fatal to the first plea; and is also liable to another equally fatal. It begins and ends in bar; See 1 Chitty, 510; 1 Saund. 28, n. 3.

As the note does not include any of the usury reserved on the contract of 1818, and, therefore, is not contaminated by the contract, according to the authorities cited; and as, therefore, it can only be objected to so far as it is void by the operation of the act of 1819, and for that purpose the plea is not good, the demurrer was properly sustained.

If Lillard can establish the facts intimated in his pleas, the chancellor who does not inflict penalties, but does justice between parties, can and will relieve him to the extent of any injury which he may be in danger of sustaining, by being compelled to comply with his contract.

Judgment affirmed, with costs and damages.

Triplett, for plaintiff; *Monroe* and *Sanders*, for defendant.

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LILLARD vs. FIELD.

The counsel for the plaintiff in error, presented a petition for a re-hearing.

Petition for a re-hearing.

The counsel for the plaintiff in error solicits a reconsideration of the opinion of the court. The court decide the defence set up in the first plea, is available at law, but the plea is not issuable, and has not been kind enough to give us a better form. The issue could not be formed on it; as to the plea, it is herewith copied, viz: "This day came Mark Lillard, by his attorney and defends the wrong and injury, when and, &c. and says, the plaintiff to have and maintain his action, for part and parcel of said debts, in the declaration, ought not, because he says that the said writing in the declaration mentioned, was made by the said Lillard, on the 3rd day of June, 1825, at the court house and circuit aforesaid, to secure the repayment of a certain sum of money previously lent to Thomas Lillard, to-wit: the sum of seven hundred and fifty dollars, on the ——— day of October, 1817, at the court house and circuit aforesaid, and it was there corruptly and against the forms of the statute in that case made and provided, agreed by and between said Lillard and Field, that said Field should lend and advance unto the said Thomas Lillard, the sum of seven hundred and fifty dollars, in lawful money; and the said Lillard should, for the forbearance and giving day of payment thereof, to said Lillard, until the 3rd day of June, 1825, then next ensuing, and said Lillard, for the loan and giving day of payment thereof, as aforesaid, and for the time, should give and pay to the said Fields, the sum of seventy-five dollars per annum for interest; and for securing said sum so lent and interest, promissory notes were executed, and in pursuance of said corrupt agreement, on the 3rd day of June, 1825, the parties, to-wit: said Fields and Lillard, came to an adjustment of said principal and interest, usuriously agreed on. The said Fields received the sum of three hundred dollars usurious interest, and said Thomas Lillard and Mark Lillard executed their note in the declaration mentioned, for $908 13 cents, including therein as usurious interest, the sum of one hundred and fifty-eight dollars thirteen cents, for usurious interest, at the rate aforesaid; and the defendant in fact says, that the amounts so included in said note and usurious interest received,

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amount to $458 13 over and above the sum of seven hundred and fifty dollars loaned, and the said Lillard avers that the said sum of 10 per cent. interest so reserved and received aforesaid, exceeds the rate of six pounds for the forbearing and giving day of payment, of one hundred pounds for one year, and contrary to the form of the statute in such cases made and provided. By means whereof, and by force of said statute, said writing is void in law, for all sums except the sums due as loaned aforesaid, with interest, after deducting the sums paid and reserved as usurious interest; Wherefore he prays judgment whether he ought to be charged beyond said sums. This he is ready to verify, wherefore he prays judgment, &c.

TRIPLETT, p. q."

Your honors say no precise sum for usury, is shown, we will ask the court if there is any words that could be used stronger, than to say "that *one hundred and fifty-eight dollars and thirteen cents, was included in said note as usury*;" also showing that three hundred dollars had been paid as usury; which, on any calculation, would amount to the sum averred, seventy-five dollars per annum, for the forbearance of $750 for one year. The averment in the plea, is express and positive, that ten per cent. per annum was reserved as usurious interest, and that three hundred dollars had been paid and the remainder included in the note sued on. Previous to the statute, approved, 6th February, 1819, the whole note was void, and in equity the usurious and legal interest was always relieved against; See Digest, 1225; Cave against Davis, not reported in your own court. The case referred to in 18 Johnson, 28, is not in town; its principles and reasoning I cannot controvert; whether it was a plea of usury or not, I do not know. On reference to 2 Churches Digest, 1079 of the decisions of New York, I find the following note, "where a plea, at its commencement, purports to be an answer to the whole, but answers only a part of it, it is bad. Hullet against Holmes, 18 Johnson's Rep. 28. If this is the case relied on, it has no bearing on this case, as this plea only professes to answer to part and parcel of said demand, and the court could have rendered judgment for the amount due, without the intervention of a jury. A small calculation would

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HEAD, HOBBS ET AL. vs. WARD ET AL.

have produced the true result, $158 13 from the amount of the note, would have produced the true amount, as the plea shows $300 as usury had been paid, which was more than covered, the legal interest, due on said original loan. A reconsideration is respectfully solicited.

Petition for a re-hearing.

Upon which the court made the following correction of the opinion delivered, but overruled the petition.

We had transposed the order of the pleas, and, therefore, miscalled the second plea the first, and the first the second; consequently, we were mistaken as to the precise import of the first plea.

But our objections to the first plea are not removed; we are still unable to determine whether it is a plea of $458, or of only $158.

And besides, the note given in 1825, was virtually payment and a reloan. See De Wolf vs. Johnson, 10 Wheaton, 393; no previous payment of usury can contaminate it.

Here the $300 paid, discharged the usurious four per cent. and more, and it does not appear that any usury infects the note. It is not for as much as principal and six per cent.

CHANCERY.

Head, Hobbs et al. vs. Ward et al.

Case 63.

Error to the Jefferson Circuit; HENRY PIRTLE, Judge.

Mortgage. Mortgagor. Mortgagee. Possession of Mortgaged property. Deeds of trust. Fraud. Registration. Notice. Statute.

April 20.

Judge ROBERTSON delivered the opinion of the Court:

THESE are two suits in chancery, which were consolidated in the circuit court.

First bill.

The first was a bill, filed by Ward, against Head, Hobbs & co., and their trustees, to set aside a deed of trust, executed to them, by Laws, for several slaves to secure debts.

Second bill.

The other was a bill exhibited by a part of the firm of Head, Hobbs & co., vs. the other members of the

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firm, and the trustees, and against Laws and Ward, to enforce the sale under the deed of trust, or some of the slaves which remained unsold, and a contribution of their share of the proceeds of the sale of others that had been sold by the trustees.

Dates of deeds of trust to Head, Hobbs & Co.

The deed of trust, for the benefit of Head, Hobbs, & co., was executed in October, 1818, and recorded in January, 1819.

Ward's claim

Ward claims the slaves included in this deed of trust. His claim is founded on deeds of trust, and bills of sale, of a date, posterior to the registration of the deed to Head, Hobbs & co.

Decree of the circuit court.

He charges, that the deed to Head, Hobbs & co. is fraudulent in law, and in fact. The circuit court dismissed the bill of Head and Hobbs, and decreed in favor of Ward on his bill, $1153 12 cents against Head, Hobbs & co., for the slaves sold by them.

This decree cannot be sustained.

The rule, that if possession remains with the gantor, in an absolute deed or bill of sale, such deed or bill of sale is fraudulent, *per se*, as to purchasers & creditors, does not apply to mortgages, deeds of trust, or conditional sales.

The deed to Head, Hobbs, & co., was not fraudulent, *per se*, as the counsel for Ward supposed. The cases cited by them, do not apply to this deed. They only decide, that the vendor retaining the possession of property, the tile to which had been transferred to another, by a deed or bill of sale absolute on its face is, *per se*, fraudulent as to creditors and purchacers. This doctrine is indisputable. It is, because the possession is incompatible with the writing, that the fraud is inferred by the law. But it applies to personal property: it is not as an inflexible rule, applicable to real estate because the possession is not the best evidence of title to real, as it is of right, to personal property. Besides, if the rule applied to real estate, its reason does not exist when the deed is conditional; such as a mortgage or deed of trust. The possession never accompanies such deeds as these, unless (which is seldom the case) there is an express agreement to that effect. The conveyance is considered as a collatteral security, and the title is virtually in the conveyor, until foreclosure or sale. The possession by the mortgager of mortgaged property, after the date of the mortgage, is not, *per se*, fraudulent; and the same

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HEAD, HOBBS ET AL. VS. WARD ET AL.

principle applies to deeds of trust. We know that Kent, in his Commentaries, suggests a different opinion. But our respect for this eminent jurist, will not justify a reversal of the long established law. We consider the doctrine so well settled here by adjudications, as well as by a correspondent practice, that we do not deem it necessary to employ the arguments, that might be very forcibly urged, or to give an analysis of the cases reported, to prove that the possession of the mortgagor, is not, "*per se*," fraudulent; such possession, before forfeiture, cannot be construed to be fraudulent, because it is consistent with the title; that not vesting until forfeiture. Nor can a continuation of the possession, after a breach of the condition, *of itself* unconnected with any other circumstance of lapse of time, or the conduct of the mortgagee, be considered a strong badge of fraud. The deed is still a mortgage; the right of the mortgagee is still contingent and collatteral; and the possession of the mortgagor, is not necessarily inconsistent with the title. We do not know why it should be feared, that a possession by the mortgagor, either before or after forfeiture, would give him a credit more delusive, than that of the mortgagee, would extend to him. The deed is recorded, and is notice to the world. Neither the mortgagor nor mortgagee, can convey the absolute title. A purchaser of such title from the mortgagee, would be as much deceived, as if he had purchased from the mortgagor. In the one case, he would be liable to loose the property, on the payment of the mortgage debt; in the other, he could not hold it without discharging the debt. Who then would be most likely to be deceived by a delusory possession; a purchaser from the mortgagor, or one from the mortgagee in possession? If we should adjudge the possession of the mortgagor, abstracted from any other facts, to be intraversable evidence of fraud, or in other words, "*fraud in law*," such a sentence (it seems to us,) would be a legal fraud, on the rights of the citizen, and on the common sense of society.

We should not have noticed this subject, if it had not been the occasion of earnest argument by counsel in this case; and we shall pursue it no farther, except

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to refer to a very few of the host of authorities, in support of the position, which we maintain. See Robards on Frauds, 560; Cadogan vs. Kennet; Cowper, 432; Hamilton vs. Russell, 1 Cranch, 309; M'Gowan vs. Hoy, 5 Littell, 243.

The cases relied on by Kent, are post-revolutionary, and not only will they (when all of them are collated) not sustain him, but he is overruled by the supreme court of his own state.

Possession of mortgagor, even after forfeiture, is not, *per se*, evidence of fraud: when mortgage, or other conditional sale, is good in the beginning, it will continue good, in law, notwithstanding the possession of mortgagor or vendor.

A mortgage or other conditional sale, being good at the commencement, without a transfer of the possession to the mortgagee, or vendee, it will, *in law*, continue so, notwithstanding the retention of the possession by the mortgagor or vendor, after forfeiture; lady Lambert's case, Touchstone, 65.

The possession of the mortgagor or vendor, on condition, might be characterized by such circumstances, as would establish fraud conclusively, as in the cases of Pitts vs. Viley, and many others reported. But, in the abstract, it is not fraudulent.

Deed of Head, Hobbs & Co. declared valid. Having been recorded in time, supersedes the necessity of actual notice.

The facts of this case, according to our construction of them, will not authorize us to decide, that the deed of trust to Head, Hobbs &co., is fraudulent either in law or in fact. This deed having been recorded in proper time, it is immaterial whether Ward had, or had not actual notice of it. But the fact, that he, for the same debt, obtained two deeds of trust, and afterwards, a bill of sale for the same property, and took it into possession, is strong, intrinsic evidence of his actual notice, and that he relied on the possession.

The decree in favor of Ward, must be, and is reversed.

An act of the legislature which operates upon vested rights, or upon contracts, prospective, unless expressly to the contrary, and then void, if it im-

It results from the foregoing opinion, that there was error in the dismission of the bill in the other case. The complainants, were entitled to relief. The sale by the trustee in January 1820, was without a decree of court; but it was made with the assent of Laws. And if it had not been, it could not be objected to by him, or his heirs, merely because there had been no decree on the deed of trust. The act of 1819, which requires such a decree, must be construed to be pros-

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LILLARD vs. FIELDS.

pair the obligation of contracts.

pective. Acts of the Legislature, which operate on vested rights, or on contracts, cannot be retroactive, unless they are made so expressly; and even then, they will be inoperative, so far as they might impair the legal obligation of contracts. A decree therefore in this case, was not necessary to give validity and effect to the sale. And we are not allowed by the evidence to vacate the sale, for imputed fraud.

Wherefore the decree in this case is reversed also, and both cases are remanded for such decrees to be rendered, as shall be just and equitable according to the principles of this opinion.

Denny, for plaintiff; *Crittenden and Richardson*, for defendant.

COVENANT.

Case 64.

Lillard vs. Fields.

Error to the Anderson Circuit; THOMAS M. HICKEY, Judge.

April 20.

Usury. Statute. Plea.

Judge ROBERTSON, delivered the opinion of the Court.

Character of suit.

FIELD sued Mark Lillard as surviving obligor, in a covenant executed by Thomas Lillard and himself, for $52 62 1-2 cents, in commonwealth's paper.

Def'ts. plea.

The defendant filed a plea, which declared, in substance, that the obligation sued on, was given for excess of interest above the legal rate, reserved on a loan of a larger sum, and for no other consideration.

Demurer sustained and judgment for plaintiff.

A demurrer to this plea being sustained, a verdict and judgment were rendered for Field; and the question for this court to decide, is, whether the plea was good?

If the whole consideration of an instrument, bill, bond, note or deed, be usurious, it is void. The act of 1819 does not apply.

We are of opinion that the plea was substantially good. *If the whole* consideration were usury, the note, even under the act of 1819, is *void*. And the plea, although not very precise in the statement of all the facts, is direct and positive, in averring that there was no other consideration.

It was not necessary to allege the amount of the loan, nor its date. The plea being to the whole cause

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of action, and plainly shewing on its face, enough, if true, to bar it, ought to have been sustained. VANADA'S H'S vs. HOPKINS' ADM'RS. &c.

The judgment of the circuit court is, therefore, reversed, and the cause remanded, for proceedings consistent with this opinion.

Triplett, for plaintiff; *Monroe* and *Sanders* for defendant.

Vanada's heirs vs. Hopkins' adm'r. &c.

CHANCERY.

Error to the Henderson Circuit; ALNEY MCLEAN, Judge. Case 65.

Power of attorney. Specific performance.

Judge UNDERWOOD delivered the opinion of the Court. April 20.

THE chief question in this cause, turns on the validity of the acts of Samuel Hopkins, deceased, acting in the character of attorney in fact, for Walter Alves. On the 27th of September, 1807, Alves executed a power of attorney, vesting authority in Hopkins, to sell 494 3-4 acres of land, in Henderson's grant; "also, all his, said Alves' part, or share of the north west quarter section of lot No. 5, north of Green river, in said grant, being the same that was allotted to James Hogg, by the company in the deed of partition, forty-one forty-eighth parts thereof, being by him conveyed to George Hogg, and by him to said Alves. The deeds which show the above conveyances, being recorded in the office of Henderson county, the legal title to the remaining seven forty-eighth parts still remaining in the heirs and representatives of said James Hogg, of whom said Walter is one, &c." The power proceeded as follows: "and I authorize my said attorney to sell my said forty-one forty-eighths of said lot, say 845 acres, as it is at present undivided, or to obtain any equitable division thereof, agreeably to law, and sell it all together or partially, as he may think best; and I further empower said Samuel Hopkins, to sell for credit or otherwise, and for such sums of money as he may think proper, and I do hereby bind myself to ratify and confirm whatever my said attorney shall legally do in my name, in virtue of the premises." On the 13th of October,

Bill, filed for specific execution of a contract, made by Hopkins, for himself, and as attorney of W. Alves, with the ancestor of compl'ts. statement of the facts, power of attorney, and contract.

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VANADA'S H'S vs. HOPKINS' ADM'RS. &c.

1808, said Hopkins "for himself, and as attorney for Walter Alves," entered into a contract with Martin Vanada and Charles Winpee, in which it is stated that "Hopkins, for himself and as attorney, &c. hath sold all the land they own or possess in Henderson's grant, in lot No. 5, on the north side of Green river, lying north east of a line to be run across the said lot, No. 5, to begin at Griffith's pond, &c. The agreement further says, "Samuel Hopkins obliges himself, his heirs, &c. for himself and as attorney as aforesaid, to make or cause to be made to them, (to-wit: Vanada and Winpee,) a good title, in fee simple, to the said lands, with general warranty, and it is signed and sealed thus, "Samuel Hopkins for himself, and as attorney for W. Alves," (seal). The contract between Hopkins for himself and as attorney in fact for Alves, and Vanada and Winpee, does not specify any certain quantity of acres, as having been sold, but Vanada and Winpee were to have all the land owned by Hopkins and Alves, included within the boundaries of lot No. 5, lying north east of a line to run across said lot No. 5, "to begin in Griffith's pond," &c. A survey having been executed to ascertain the quantity, it was found that there were 325 acres, which the bill alleges were sold by Hopkins, as attorney in fact for Alves. Hopkins and Alves being dead, and neither having conveyed the land to Vanada, (who by a division of the land, jointly bought by him and Winpee, had become entitled to the said 325 acres,) he filed his bill against the heirs of Alves and Hopkins, and the administrator of Hopkins, with a view to have a specific exemption of the contract, and for general relief.

Grounds upon which the heirs of Alves resist specific performance.

The heirs of Alves do not resist a specific execution of the contract, upon any plausible ground, other than the want of authority on the part of Hopkins, under his power, to bind them or their ancestor, by the contract as made and entered into with Vanada and Winpee. The points relied on by them are: 1st. That the power of attorney did not authorize Hopkins to sell less than Alves' entire interest in lot No. 5, without first having procured a division and a severance of his interest from that of his co-tenants; in which event it is conceded he might have sold less than the entire interest: And, 2d. That the contract as signed

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by Hopkins, does not impose any obligation on them or their ancestor.

In relation to the first point, the defendants, heirs of Alves, insist that Hopkins departed from and exceeded his power, and consequently, that his acts are void. We readily admit, that whatever act an agent does, unauthorized by the authority vested in him, is not binding on his principal, and we also concede that agents may be limited and restricted to specified and particular acts, so that they may be deprived of all discretion. To enforce these doctrines, it was useless to cite authority. They are based upon the common sense of all men, and engrafted in every civil code; and were it otherwise, the principal's most valuable rights might be sacrificed by the ignorance or wickedness of an agent, in whom the principal had no intention to vest any discretion, or to give any power but to carry into effect positive instructions. Whenever one man presents himself as the agent of another, it is the duty of all who may have transactions with him, in his representative character, to inquire into the extent of his authority, and they must deal with him at their peril. But all powers conferred must be construed with a view to the design and object of them, and the means most usual and proper for carrying their design and object into effect, having respect to the language which the maker of the power employs, to convey his meaning and intent.

Rule as to validity of the acts of agents. Duty of those dealing with them: powers of attorney to be construed.

The language of all nations is liable to fluctuate with the changes that take place, in the progress of time, in their affairs and condition. A word or a phrase which has a definite meaning, and which will be universally understood in the same sense by all who speak the language, from various causes, may loose its original signification, and ultimately have a meaning attached to it, essentially different. It is the duty of courts to take notice of these mutations in language. Without doing so, they cannot observe the great and paramount rule of effectuating the intentions of men in all their transactions. Accordingly, in the case of Lampton vs. Haggard, 3 Monroe, 149, this court have interpreted the expressions "Kentucky currency" and "currency of the state," which are equivalent, to mean very different things at different times.

The court will notice fluctuations & mutations in language.

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VANADA'S ADM'S vs. HOPKINS' ADM'RS. &c.

The power of attorney to Hopkins, examined.

Had Hopkins authority vested in him, by the power to sell less than the entire interest of Alves, in lot No 5? If he had not, then he has conferred no right on Vanada, and imposed no obligation on Alves. The question must be answered by construing the power according to the rule prescribed, that is, with a view to the design and object of the power, and the means most usual and proper for carrying *the design* and *object* into effect, ascertaining these by the popular signification of the language employed at the date of the power, by its maker, to convey his meaning. The first sentence in the power, relative to lot No. 5, authorizes Hopkins to sell all Alves' part or share of the north west quarter section of lot No. 5. Were this the only sentence in relation to this land, there could be no doubt of Hopkins's authority to sell, not only the forty-one forty-eighths, conveyed to him by George Hogg, but also the interest he held in the residue, as one of the heirs of James Hogg. By subsequent sentences, the power states that the attorney may sell forty-one forty-eights of said lot, say 845 acres, as it was undivided, or to obtain a division and sell it altogether or partially, as he may think best. It is contended that those last sentences qualify the first, and deny to the attorney the power to sell the interest of Alves, held as one of the heirs of James Hogg, and also confine the attorney to making a sale of the whole 845 acres, as it stood, undivided, at the date of the power, to one or more purchasers, in a single contract, at the same time, or to a sale of Alves's interest altogether, or in parcels, after a division shall have been obtained.

A general power to sell, is not restricted by modes of selling pointed out specifically, which do not, necessarily, abrogate or confine the general power.

There is no express declaration on the face of the power, which shows an intention on the part of Alves, to limit and restrict, by these latter sentences, the operation of the grant of the power in the first instance, to sell the entire interest. The argument in favor of such restriction, is founded on the supposition that the authority to sell, in the particular manner pointed out, excludes the idea that a sale can be effected in any other way. We are of opinion that the maxim "*expressio unius est exclusio alterius*," does not apply. Such a construction would tend to nullify the grant of power to sell the entire interest, first given, which does not prescribe any rule for the government of the attorney;

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in selling. All the grants of power can stand together by a construction of the instrument giving effect to all its parts, and one more congenial with the intention of Alves, to be collected from considering the general import of the whole instrument, than that contended for by the appellee's counsel. It is this, as authority had been previously given, without any restriction, to sell 494 3-4 acres, part of Thomas Hart's lot, No. 7, and as the first sentence in relation to his, (Alves') interest in lot No. 5, is equally extensive, and as the authority to sell both is so far placed upon the same footing, he intended to make no difference between them; but as others had a very small interest with him in the last tract, he gave the power to have their interest separated from his, if the attorney should deem that trouble and the expense incident to it, useful, in the accomplishment of the object in view, to-wit: the sale of the land; and added the expression, "sell it altogether or partially, as he may think best;" not for the purpose of restricting power already vested, but to satisfy all purchasers that in any event, his attorney in fact was completely authorized to sell, without restriction. Moreover, as the heirs of James Hogg owned a small part of the land, purchasers might make that an objection; if so, Hopkins was vested with power to obviate it by procuring a division. Hence the power to procure a division was inserted, through abundance of caution, to enable the attorney to obviate difficulties which might be started by those wishing to purchase, without any intention to limit the general power to sell, previously vested. This view is fortified by the unlimited discretion given Hopkins, as to price and credits. Believing that there is no less authority in Hopkins, by the power to sell Alves' interest in lot No. 5, than there is to sell his interest in No. 8, it is still to be decided whether Hopkins could lawfully sell a smaller quantity than the entire interest. This brings us to the consideration of the means which may be employed to effectuate the power.

In determining whether an agent has exceeded his authority, the

When a power is given to do a thing, the use of the means to accomplish it are included and necessarily granted likewise. These, according to the rule already prescribed, should be such as are most usual and

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which are proper to accomplish the thing intended to be done. They should be such as are ordinarily used by prudent, discreet men, in doing similar business. The courts must notice the transactions and business of society, and from their knowledge, ex-officio, determine on the usual and proper adaptation of means to accomplish an end, for which, power is vested in an attorney in fact. Hopkins was authorized to sell two tracts of land, one of 494, the other of 845 acres; was he bound to sell by entire tracts? His letter of attorney does not so direct. Is it usual for those wishing to sell lands, having so much in a body, to sell by entire tracts, or to divide them so as to suit purchasers, leaving the part unsold in convenient form for future sale, when a purchaser may present himself? We have no doubt such has been the common practice of prudent, discreet men, in managing their own estates; and if so, an agent acting under a general power to sell, may do the same thing. The situation of the country affords strong reasons in support of such practice, on the part of owners and their agents. Two hundred acres of land will make a comfortable farm; a large portion of the land-holders of the country do not own more; and many who wish to buy land, are not able to pay for more; unless, therefore, Hopkins had power to sell less than an entire tract, he was placed by his principal, in a condition in which he was unable to act, according to the circumstances by which he was surrounded, and the general practices of the country. To put such a construction on the power as would result in a denial of the usual means to accomplish the end, would be to make the power ineffectual. We have no doubt but it did authorize Hopkins to sell either tract in parcels, and that his discretion was confided in as it respects the quantity of either tract he might sell. It is conceded that there are many cases where an agent would not be authorized to divide and cut up the thing to be sold, but that he would be bound under a general power to sell the entire thing. The principles already advanced, indicate when it would be proper to take the one course or the other. We do not coincide with the circuit court in the opinion, that Hopkins had no authority to sell less than the whole 845 acres, until Alves's interest was severed from that of his co-tenants.

court is bound to consider the usual mode, in which the object to be effected is attained. To deny the means, is to defeat the end.

Opinion of the circuit court overruled.

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But it is urged, that Hopkins sold to Vanada and Winpee, 325 acres, by metes and bounds, and thus he sold land, which in part belonged to Jas. Hogg's heirs, as no division had been effected between them and Alves. This view of the subject is not warranted by the written contract, entered into, between Hopkins, Vanada and Winpee. By that contract, Hopkins, for himself and Alves, only sells the land *they owned or possessed* in lot No. 5, north east of a line, to be run across the said lot, &c. If James Hogg's heirs had any interest in lot No. 5, north east of the contemplated line, they retain it yet, and we perceive no objection to decreeing a conveyance of Alves's interest, north east of that line, to Vanada's heirs, and leaving them and Hogg's heirs to settle their interests in common, if such shall be created, upon the principles of law, applicable to such cases.

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The sale of Hopkins to Vanada and Winpee, only the interest of himself and Alves.

The contract signed by Hopkins, states, that the conveyance is to be made by deed, with general warranty. It is contended, that this is unauthorized, by the power, and 7 Johnson, 390, and 5 Johnson, 57, are relied on as authorities, to establish the position. The case in 7 Johnson, was that of an authority, given to sell a ship. It was special. The agent practised a fraud in the sale, and the question was, whether the principal was liable for it. The court held the negative, and very properly. A special delegation of power, to sell a ship, in the same manner that the owner might, gave no authority to practise a fraud, for which the principal would be liable. The agent therefore having exceeded his authority, was responsible for his fraud and not his principal. There is a distinction between the acts of a general agent, constituted by parol and known by his general conduct in the business of his principal, and those of a special agent with power to do a particular act; a power to make representations is said to be necessarily implied by such general agency, and if they be falsely and fraudulently made, it is said the principal shall be answerable. In these doctrines, we find nothing decisively applicable to the present case. They have grown out of mercantile transactions, and there is strong reason for holding the principal liable for the frauds of his agent, in all cases where an authority to make representations can be implied. The

The cases in 7 Johnson, 390, and 5 ib. 57, reviewed.

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case in 5 Johnson is more analogous to the present. In that case, it was held, that an authority to sell and to execute *conveyances* and *assurances* in the law, of the lands sold; and *where no power was given to bind the principal by covenants*, that a covenant of seisin, inserted in the deed executed by the attorney, was void. The reason assigned for it by the court, is, that as a conveyance or assurance, is good and perfect, without either warranty or personal covenants, they are not necessarily implied, in an authority to convey. There is no reference to authorities, in support of this case, and it may be well doubted whether in this state it can be regarded as sound law, to the extent insisted on. The court state, in the case in 5 Johnson, that *no power was given, to bind the principal by covenants*. If the letter of attorney, in that case, contained a clause limiting the agent's power, in express terms, and forbidding him to attempt binding the principal by personal covenants, we readily admit, that all such covenants, inserted in the deed were void; but if the letter of attorney, was merely silent on the subject, then we doubt the correctness of the opinion as applicable to similar transactions in this state.

A contract for land not binding, unless in writing

A power to 'sell,' silent as to execution of *bond* or *deed*, or other writing, nugatory; unless *ex vi termini*, the agent has power to bind his principal, by writing, to make the purchaser a *sufficient deed*, upon the payment of the purchase money.

The power executed by Alves, authorizes Hopkins to *sell*. It says nothing about Hopkins executing conveyances of the title, or bonds for the title. It gives Hopkins, unlimited discretion, as to credits. The statute of Frauds, requires contracts, relating to the sale of land, to be reduced to writing. When Hopkins made a contract of sale under the power of Alves, to make it obligatory, under the statute, it must be reduced to writing, either by an executory contract or by deed, passing the title. If the power to *sell*, does not necessarily import a power to *convey*, or the power to execute a *title bond* or other *executory contract*, binding Alves to make a title, then his letter of attorney, to Hopkins, although solemnly executed, would have no practical and binding effect. To consider it a nullity, would be absurd. How far then did it go in vesting Hopkins with power to bind Alves by written contract? We cannot give it less effect, than to authorize Hopkins, in consideration of the sum, which the purchaser may promise to pay, to give a title bond in the name of Alves, binding him, on the payment of

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the money, to make a sufficient title. What kind of deed or conveyance, would such a bond require? The case of Fleming vs. Harrison's devisees, 2 Bibb, 171; furnishes the answer. It would be a deed with general warranty. And there is the strongest reason, founded on moral fitness and justice for the opinion, a covenant to convey land, does not create and vest in the covenantee, a legal estate in the land; but it invests him with a legal right to demand such an estate, and unless he can get such an estate, he may vacate the contract, and recover the purchase money. If then, he is to accept a deed, by which his covenant is satisfied, it should be such a deed, as would, in the event of a paramount title, ousting him, give all the right to recover the purchase money, which existed on the covenant, before it was satisfied, by the acceptance of the deed.

A power "to sell" land, implies a power, to bind the principal to convey, with general warranty, unless there be restraining words.

The power of attorney, did authorize Hopkins to stipulate for the conveyance of the legal estate. If Alves did not intend to go that far, he was vesting a colourable power in Hopkins, by which to deprive men of their money, without responsibility on his part; no one would so understand the power from its general tenor and language. Hopkins having power to contract for the conveyance of the legal title, had therefore authority to stipulate for a conveyance by deed, with general warranty. Such would have been the legal result, without an express stipulation to that effect, had his contract with Vanada and Winpee, only covenanted to convey the legal title. The letter of attorney sets up a legal title to the lands which Hopkins was authorized to sell in Alves. They are lands conveyed to him and descended to him. It is this legal title which he authorizes Hopkins to sell, and it is the legal estate, he ought to assure by deed with general warranty. Such a construction does him no injury, and we think it warranted by law. The case of Fugate vs. Hansford's executors; 3 Littell, 262, shews that an instrument expressive of a contract of sale, although it may not stipulate to convey, will justify a court of chancery in decreeing a conveyance. If it were then conceded, that Hopkins, under the power was not authorized to *convey*, yet as his right to *sell* is unquestionable, a court of chancery, by bringing Alves

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VANADA'S H'S vs. HOPKINS' ADM'R. &c.

or his heirs before it, will compel them to do, by conveying, that which will give effect to sales made by Hopkins.

If an agent sell land and add covenants, not warranted by his authority, the purchaser may, at his election, enforce so much of the contract as conforms to the authority, or claim a revision of the whole, if the principal will not enter into the covenants

The stipulation in Hopkins's contract, to convey with general warranty, is not a departure from his power. But even if it were, we are not prepared to admit, that the whole contract was vitiated by it, and rendered a nullity. On this point, the case of Dehart, &c., vs. Wilson &c., decided by this court, at the April term, 1828, is cited. There a particular authority was given to execute an injunction bond conditioned, as required by law. The court decide, that the bond actually executed by the agent, differed in the condition of it, substantially, from the condition prescribed by law. Imposing on the principal, in the opinion of the court, a liability, different from that which he authorized his agent to impose, it was therefore, not binding. But here a power to sell land is given; no particular form is prescribed for the instruments which the agent may execute as evidence of his sales. If therefore, in any such instrument, he shows what land he did sell for his principal, and it be the land he was authorized to sell, and then proceeds in the same instrument, to bind his principal to do an act not warranted by the power, it seems to us, that the principal may well be coerced to perform that part, wherein the agent had power to bind him. In such a case, the purchaser or covenantee, might well resist a specific execution of the contract, because he could not get all which his contract stipulated he was to have; but when he is willing to accept a part only, and that part which the agent had authority to sell or to contract for, we see no ground upon which the principal can object. In such cases, the doctrine of Coke may be safely relied on, that, "where a man doth that which he is authorized, and more, it is good for that which is warranted, and void for the rest." If then, the stipulation to convey with *general warranty*, exceeded the power, we are of opinion, that the only effect it should have ought to be an exhoneration from the warranty.

The signing

The second question relates to the manner of signing the contract by Hopkins. It is contended by the

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counsel for the appellees, that it is the contract of Hopkins alone, and that it cannot be enforced upon Alves, or his heirs. That Hopkins is personally bound by the contract, from the manner of its execution, we will not question. We might concede, that an action of covenant upon it, for failing to convey, or cause to be conveyed, would entitle the covenantees to recover against Hopkins, as well for the land, owned by Alves, as that owned by himself. But it does not thence follow, that a suit in chancery, may not compel Alves, or his heirs to a specific execution. The rule that an attorney, in executing an authority, should do it in the name of the person giving the power, and not in the name of the attorney, is laid down as a correct one by Paley, on Agency, 152; and Coke Lit. 258, a. and we have no doubt of its propriety; but we have not been able to find any adjudged case, applicable to an executory contract, forbidding the chancellor to interpose, to aid a defective execution of a power, when the defect consists in the difference between signing the principal's name *by* his attorney, and signing the attorney's name *for* the principal. In executed contracts, such as the case of Harper vs. Hampton; 1 Harris and McKenney, 175 (note) and Frontin vs Small, 2 Raymond 1418, courts have held deeds invalid, which were executed in the name of the attorney *for* the principal, regarding such deeds as the acts of the attorney, and not the acts of the principal. But the case of Harper vs. Hampton, referred to, was not decided by the court of appeals of Maryland, in which it was pending, at the date of the note referred to, and how it was finally disposed of, we know not. The case of Onion's lessee vs Hall, to which the note relative to the case of Harper vs. Hampton is attached, is an authority in support of the validity of a deed, executed by signing thus, "Roger Matthews attorney in fact, for the said Anna Wriothesley," and which in its commencement, purports to be a deed between said Anna, and Wm. Brown The signing in this case, bears a strong analogy to the signing by Hopkins for Alves, and it may be remarked, that the contract which is sought to be specifically executed, shews upon its face, beyond all doubt, that Hopkins in styling himself attorney for Alves, did not merely design

'Samuel Hopkins, for himself, and as attorney for W. Alves,' binds him, personally, and though not in form; yet it is such an exemption of the power, as will warrant a chancellor in decreeing a specific performance of the executory contract, which it evidences against the heirs of W. Alves.

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VANADA'S H'S vs. HOPKINS' ADM'R. &c.

The compl'ts. in the court below were entitled to a specific performance.

thereby, a description of his own person, but that Alves, was intended to be affected by it. It is obviously an attempt on the part of Hopkins, to execute his power, by entering into an executory contract. Whatever adjudications therefore, may have taken place on trials at law, in regard to executed contracts where attorneys have not observed the proper *form*, in the execution of their authorities, we do not feel ourselves constrained to apply the rigid rules, to be found in some of them, to executory contracts, in a chancery proceeding like the present. It is the chancellor's proper element, to decree a specific execution of agreements, to assist defective conveyances, and to aid defective executions of powers. In Sugden on Powers, 344, it is laid down, that "at law, the omission of any circumstance required to the execution of a power, was deemed fatal; but equity, where there was a good or a valuable consideration interposed its aid, and supported the defective execution of the power." "A power of attorney, is a common law authority." Sugden, on Powers, 1. If the contract between Hopkins, and Vanada and Winpee was invalid at law, so far as Alves and his heirs are concerned, in chancery, it is otherwise. There it ought to be enforced. The statute of Frauds, does not prohibit our doing it. The terms of the sale are evidenced by writing, signed by the agent for the principal, and we cannot perceive any mischief likely to result to society from enforcing a specific execution in such cases.

We are therefore of opinion, that the circuit court erred in refusing relief to the complainants, now plaintiffs in error; they were entitled to a specific execution of the contract of their ancestor, conformably with this opinion. Had it been proper to dismiss the bill, as to the heirs of Alves, the court ought not to have dismissed it as to Hopkins' administrator and heirs. If the plaintiffs in error, could not get the land from Alves' heirs under the prayer for general relief, a decree should have gone against the representatives of Hopkins. But it is not necessary to state more on this point, as we are of opinion, the plaintiffs in error were entitled to a conveyance from Alves' heirs, for the interest of their ancestor in their land described in the contract sought to be enforced.

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The decree of the circuit court is reversed, and the cause remanded with instructions, to render a decree not inconsistent with this opinion. The appellants must recover their costs. LOFTUS vs. LOCKER, &c.

Crittenden and *Denny*, for plaintiffs; *Mayes*, for defendant.

Loftus vs. Locker, &c.

SCIRE FACIAS

Error to the Christian Circuit; B. SHACKELFORD, Judge. Case 66.

Scire facias. Executor. Assets. Legal. Equitable. Devastavit. Judgment. Quando acciderint.

Judge ROBERTSON delivered the opinion of the Court. April 21.

LOCKER and Wheatly, having, on an issue of *plene administravit*, recovered judgment, "*quando acciderint*," against Loftus, as executor, afterwards issued a *scire facias* against him, reciting their judgment, and suggesting that assets sufficient to pay their judgment, had since come to the hands of the executor. Statement of the case.

On an issue involving the question, whether assets had come to the hands of the executor or not, the jury found a verdict against the executor, and the court, thereupon, rendered judgment for executor, &c.

On the trial it was proved, that after the date of the judgment, in favor of Locker, &c. the executor had sold a tract of land, devised to be sold, for payment of debts, and had received between $1200 and $2000 for it; and it was also proved that other judgments had been obtained against the executor, by default, since the date of Locker and Wheatley's judgment.

The court instructed the jury that the money received for the land, was equitable assets, which could be reached only by bill in chancery, and that, therefore, the proof in relation to that fund must be disregarded. And the court also instructed the jury, that the said judgments against the executor, by default, were *conclusive* evidence against him, of assets. Instructions given to the jury.

Exceptions were taken to these instructions, by the counsel of the parties respectively.

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LOFTUS, vs. LOCKER, &c.

Land devised to be sold for the payment of debts: equitable assets. The money arising from sale, when collected, legal assets.

The court erred in each opinion. Before the land was sold and the money collected, the devise for payment of debts, might be assets in equity; but the money, when received by the executor, was assets "*enter mains.*" The land devised to be sold was considered, in equity, as money, before the sale. After the sale, the money produced by it, was assets derived from the estate of the testator. The first was equitable, the last, we are inclined to think, was legal assets. 3 Bac. Abr. 58; Har. Co. Lit. 236. Money arising from the sale of land devised to be sold, is legal assets, although the title to the land was not vested by the will, in the executor. 1 Pr. Wms. 151; Toller, 412–14.

Executor may be guilty of *devastavit*, for misapplication of equitable assets, and subjected, personally, by legal process.

Scire facias proper.

We know that courts of chancery, have endeavored to expand the doctrine of equitable assets, and that modern authorities may be found in Fonblanque's notes and elsewhere, which denominate money obtained by the sale of land devised to be sold, equitable assets. But whether the money, in this case, were legal or only equitable assets, was not material to the issue on the *scire facias*. We suppose that an executor may be guilty of a *devastavit* for the misapplication of equitable assets; and may be subjected, therefor, to personal responsibility, by a proceeding at law, in this state, a suit in chancery is not necessary. After judgment, "*quando acciderint*," if any assets of any kind, liable to the payment of debts, came to the executor's hands, he ought to have appropriated them to the payment of the debts of the testator; and for not doing so, the judgment creditors could proceed against him by *scire facias*. And if by this proceeding they cannot coerce their debt, they may, in the appropriate manner, make the executor responsible as for a *devastavit*. The difference between legal and equitable assets is, that the former must be appropriated to payment of debts according to legal priority; the latter may be subjected in chancery, to all the debts, "*pari passu.*" The executor does not, by his plea, show that there are other debts, than that of Locker, &c.

Judgment vs. ex'r. or adm'r by default after judgment, '*quando acciderent*, on a former action Since the act of 1811, not conclusive of assets.

But the judgments against the executor, by default, were only *prima facie* evidence of assets, and therefore, the court also erred in deciding that they were "conclusive." Since the act of 1811, a judgment against

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an executor for debt, by default, does not, as before, conclude him as to assets. RUDD vs. THOMS.

This is the only error of which the executor complains, for which the judgment can be reversed, and for this alone, the judgment must be reversed, and the cause remanded for a new trial.

Verdict upon *scire facias*, to enforce judgment, *quando acciderint*, against ex'r. or adm'r. should ascertain the amount of assets that have come to his hand.

If there be another finding for the plaintiffs below, it should ascertain the amount of assets which have come to the executor, since the judgment which the *scire facias* seeks to enforce.

Triplett, for plaintiff; *Crittenden*, *Denny* and *Mayes*, for defendants.

Rudd vs. Thoms.

DEBT.

Error to the Mason circuit; WM. P. ROPER Judge. Case 67.

Non est factum. Variance. Evidence. Departure. Pleadings. Oyer. Bill of exceptions.

Judge UNDERWOOD, delivered the opinion of the Court.

April 21. Declaration set out an obligation payable 1st Jan. 1826; def't. plead *non est factum*. Pl'tff. offered in evidence, an obligation, the execution of which, by def't. was admitted, payable 1st. Jan. 1827, objected to for variance; the objection sustained; def't. had a right to plead as he did.

THE plaintiff in error plead *non est factum*, in these words, to action of debt brought against him by the defendant, "that the supposed writing, obligatory in the declaration mentioned, and recited, is not his deed." Issue was joined and verdict and judgment rendered for Thoms, in the circuit court. The obligation sued on, as set out in the declaration, bore date 14th August, 1826, and was payable 1st of January, 1826. In support of the issue, Thoms, on his part, offered in evidence, an obligation dated 14th August, 1826, for the sum demanded by the writ and declaration, but payable on the 1st of January, 1827, instead of the 1st of January, 1826, the execution of which, by Rudd, was admitted, but he objected to its being read as evidence, because it varied in the time of payment, from the obligation set out in the declaration. The court admitted the evidence, and whether the court erred in admitting it, is the only question for decision. It is a well settled rule, that when a deed is the foundation of the action and *profert* is made in the declaration, the defendant is entitled to *oyer*. But if the defendant does not choose to crave *oyer*, on the contrary omits it, files a plea of *non est factum*, as in

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RUDD vs. THOMS.

the present case, we know of no principle of law, or rule of practice, which prohibits his doing so. What deed was it, the execution of which was put in issue by the pleading? Surely not a deed payable on the 1st of January, 1827, but one payable on the 1st of Jan. 1826; to make the controversy turn, therefore, on the validity of an obligation, payable on the 1st of January, 1827, was a departure from the matter put in issue, and calculated to surprize the defendant in the circuit court. The evidence offered, was therefore, inadmissible. It may be urged that it was obviously a mistake, apparent on the face of the declaration, in seting out the time of payment, on the 1st of January, 1826, that being a day prior to the execution of the deed declared on. It is true that the declaration presents an apparent inconsistency, but there is no more reason to suppose, from the face of the declaration, that there was a mistake in the time fixed for payment, than in the date of the note or obligation, and the deed might have been written precisely as declared on. The proof and allegations must correspond in substance, if they do not, the plaintiff should be nonsuited. The variance between the declaration and proof, in this case, was substantial. 1 Chitty, 478, shows that the defendant in the circuit court, had a right to plead as he did.

Tho' a bill of exceptions do not state that it contains all the evidence; yet, if it shew that illegal or improper evidence was admitted as the foundation of the judgment, it manifests such error as requires revision.

The counsel for the defendant in error, insists that as the bill of exceptions does not purport to contain all the evidence given on the trial, that we should not reverse the cause, for it may be, that such an obligation as that declared on, was given in evidence, for aught that appears. We cannot admit the correctness of the argument. It is manifest from the exception, that the obligation read in evidence, and which was objected to, was admitted as the foundation of the plaintiff's right to recover on his declaration, and the judgment giving interest from the 1st of January, 1827, instead of 1826, also shows it. It will not do to disregard long settled rules of law and practice. If they procrastinate justice for a time, as may be the case in the present instance, the mischief will be less than it would be by attempting to adopt new rules to suit the justice of each particular case. Parties must present their cases under the settled rules of law, and not require courts

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to make new rules to obviate their negligence or defects.

HARDIN vs. THE GOVERNOR, &c.

The judgment of the circuit court is reversed, and the cause remanded for proceedings *de novo*. The plaintiff in error must recover costs.

Hord, for plaintiff; *Brown*, for defendant.

Hardin vs. the Governor, for Handley's Executors.

DEBT.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 68.

Sergeant of the Court of Appeals. Statute. Costs. Security.

Judge UNDERWOOD delivered the opinion of the Court.

April 21.

THE sergeant of the court of Appeals took a replevin bond, in satisfaction of an execution which issued in favor of the relators for costs recovered by them in this court. The replevin bond having become due, an execution issued on it, directed to the sergeant, and was collected by one of his deputies, who failed to pay over the money. Whereupon the relators instituted this suit against Hardin, one of the sergeants sureties, in his official bond, to recover the money for the sergeants default. Hardin resists a recovery upon the ground, that the sergeant had no lawful authority, to execute any writ of execution for costs, and consequently, that his bond did not render him responsible for any act of the sergeant or his deputies, in relation to executions for costs.. We are of opinion, that the defence relied on by Hardin, ought to have been sustained. The sixth section of the act creating the office of sergeant of the court of appeals, prohibits him from executing "any writ of execution for costs," see 2 Digest, 1128. By the same act, the clerk of this court could not direct process to the sergeant, unless at the request of the party interested, and no request of the party would legitimate the issuing an execution for costs directed to the sergeant contrary to the sixth section of the act. The condition of Hardin's bond, is that the sergeant shall discharge the duties of his office agreeably to law. As

The deputy of the sergeant of the court of appeals, collected costs upon an execution on replevy bond, and failed to pay over. Suit to render the security of the sergeant responsible. Ruled, that the act, 2 Digest, 1128, creating the office of sergeant, prohibits his collecting costs by execution. The condition of official bond not broken.

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HARDIN vs. THE GOVERNOR, &c.

the law did not make it the duty of the sergeant to collect executions for costs, but prohibited his doing it, he had no duty to perform in relation to such executions; consequently, nothing was required of the securities in the official bond, if the sergeant failed to execute such process. If, though, he proceeded to execute it contrary to law, and collected the amount, it may be said the law then imposed a duty on him, to pay over the amount to the person entitled to it. It is true, that in such case, an individual responsibility, would be imposed by law, to account for money had and received to the use of another; but we do not perceive the ground, for official responsibility in such a case. Where an officer by colour of his office, collects money, in virtue of process, which he has no legal authority to execute, and thereby inflicts an injury on the defendant in the process, by transcending his power, we do not intend to be understood as deciding, that an individual thus injured, could not maintain an action on the official bond. Such a case is materially variant from the present.

Execution being on replevy bond not material. The court will inspect the whole proceedings.

It is contended by the counsel for the relators, that the first execution for costs, was merged in the replevin bond, and that as the second execution which, issued on the replevin bond, was that on which the money was collected, that we should not look farther back, than to the replevin bond, which we should regard as a judgment for so much money, without enquiring, whether it was for costs or not. We think differently; we have a right to inspect the whole proceedings in such a case, and to prevent that being done by indirection, which cannot be lawfully done directly. If, instead of taking the replevin bond, the money had been received on the first execution, it being for costs, Hardin's bond, would have imposed no liability on him. Taking a replevin bond, and then collecting that by execution, cannot convert costs into any thing else. The securities of a sheriff, are not liable for the amount of fee bills collected by him, and which he was not bound by law to receive. The present is a stronger case in behalf of the securities of the sergeant, who is prohibited from acting on executions for costs.

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The judgment of the circuit court is reversed, with directions to render judgment in the agreed case, for the defendant in that court. The plaintiff in error must recover his costs.

VIOLET, &c. vs. WATERS.

Monroe, for plaintiff; *Brown*, for defendant.

Violet, &c. vs. Waters.

COVENANT.

Case 69.

Error to the Henry Circuit; HENRY DAVIDGE, Judge.

Defendants. Process. Service. Appearance. Practice.

April 22.

Judge ROBERTSON delivered the opinion of the Court.

Character of action.

THIS is an action of covenant, by Waters against Violet, and two others, in which a judgment was rendered in favor of the plaintiff. Three errors are assigned. 1st. That the declararation is defective, and therefore, the demurrer to it ought to have been sustained. 2d. That improper evidence, excepted to by defendants, was admitted by the court. And, 3d. That there being no evidence, that process had been served on one of the three persons sued, it was erroneous to give judgment, without a proper disposition of the case, as to him.

Assignment of errors.

There is nothing in the two first errors assigned. The declaration, although, unnecessarily minute, and indiscreetly historic, is nevertheless, very intelligible, and shews a good substantive cause of action. And the evidence excepted to, was legal and admissable.

Three persons sued; record; "the defendants appeared;" process returned executed on but two; ruled; the record does not prove the appearance of the third, and he not having been served with process, error to render judgment against him.

But the third error is fatal. It is not necessary to decide, whether, if only two persons had been sued, the often repeated declaration in the record, "the defendants appeared," and "the parties appeared;" would necessarily have included both, and such evidence of appearance, would have superseded a return of service. For, as three were sued, the expressions quoted, do not mean, barely because they are in the plural, that all three appeared, "defendants;" in the legal import of the term, means those on whom process has been served. As the writ was returned, executed on only two, the legal construction of the

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DANA vs. BROWN.

style of the record, is, that those two (who alone were defendants) appeared. If the process, was not executed on the third, the court erred in its judgment.

Unless intrinsic evidence of *diminution* court will not *ex officio*, order a *certiorari*.

There is nothing in the record which can enable this court to decide, that the writ was ever executed on more than two, or that the third person ever appeared in court. Unless the record exhibited, as it does not, some intrinsic evidence of its being incomplete, the court would not, *ex officio*, direct a *certiorari* to supply any supposable defect. It was the duty of the counsel, to have moved it, if he supposed that it could operate to the advantage of his client.

On the record, as it is, the court cannot do otherwise, than reverse the judgment, and remand the cause for proceedings, consistent with this opinion.

Monroe, for plaintiff; *Crittenden*, for defendant.

CHANCERY.

Dana vs. Brown, &c.

Case 70.

Error to the Jessamine Circuit; W. L. KELLY, Judge.

Bank. Stockholders. Charter. Parties. Lien. Lis pendens. Commissioners. Statute.

April 22.

Judge ROBERTSON delivered the opinion of the Court.

Bill to subject Crocket's stock in the F. bank of Jessamine, to the payment of a judgment, upon which executions had been returned 'no property;' Stockholders not def'ts. adjudged: the commissioners, appointed to wind up the

DANA having obtained judgment against Robert Crocket, caused executions to issue thereon, which were returned "no property." He then filed this bill in chancery, against Crocket and the commissioners of the Farmer's Bank of Jessamine, to subject to his judgment, stock owned by Crocket in that bank.

Crocket did not answer, and the commissioners admit that he has stock, in his own name, to the amount of $800; in that of his wife, for $800, and in those of his children, for $400; but insists that he owes the bank a debt larger than the amount of the stock in his own name.

The circuit court dismissed the bill absolutely, and the decree has been reversed by the late judges of this court, on the ground that the stockholders were neces-

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sary parties, and therefore, the bill ought to have been dismissed without prejudice.

We have granted a rehearing, and now decide, that the stockholders were not necessary parties, and that Dana is entitled to relief out of the $800 in Crocket's own name.

bank, were substituted; by the legislature, for the stockholders; therefore, stockholders not necessary defendants.

The Bank of Jessamine is one of those which had forfeited their charters. Its concerns were confided to the commissioners (who are defendants,) to be wound up by them. When this suit was brought, the Bank was not only "*functus officio*," and therefore, could neither sue nor be sued, in its corporate capacity, but, as its interests were all, by law, vested in the commissioners, and its funds all placed in their possession, these funds might be attached in their hands, in chancery, by a creditor of a stockholder; and in such a suit it is not necessary to make the stockholders parties. If, notwithstanding the forfeiture, the stockholders might be considered the legal owners of the stock, still, in equity, the stock in the possession of the commissioners, may be attached, without making the stockholders defendants. Because the commissioners are appointed by law to represent and act for them, and therefore, they are bound by the acts of the commissioners. But it is clear, that the stockholders can only act through the commissioners.

A bankrupt is not a necessary party to a suit against his commissioners. Wherever there is a multitude of persons interested, and there is such a privity among them, as to render a decree against some, obligatory on all, the omission to make all, parties to a bill in relation to the joint stock, is not objectionable. Thus, in a bill against the committee of a voluntary society, it is not necessary to make the members of the society, defendants. Cooper's Equity, 40. Such seems to be the relation between the commissioners and the stockholders, in this case.

The legislature, in authorizing the business of the bank to be done by commissioners, intended that it should be done without the intervention of the stockholders, otherwise, there would have been no motive for the appointment of commissioners. This provi-

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COFFEE, &c. vs. WATT.

sion of the act of assembly, was intended for the benefit and convenience of the stockholders, and their debtors and creditors; and surely it would never have been made, if the stockholders were expected to sue and be sued, or were supposed to have any right of action without the act.

We are of opinion that it was not necessary that Dana should have made the stockholders defendants, with the commissioners. The latter seem to occupy the places of the president and directors, in equity.

The commissioners had no lien upon the stock to give precedence.

The claim of the commissioners to retain Crockett's stock, for a debt alleged to be due by him to the bank, cannot avail them in opposition to the right of Dana. There is no evidence that Crocket is indebted to the bank, if there were, the bank had no lien on his stock, and no right to precedence over other creditors.

The *Lis Pendens* gives priority.

The "*Lis pendens*" in this case, gives Dana the priority. 1 Litts. Repts. 308; 4 Burrow, 2214; Lit. Set. Ca. 279; 4 Bibb, 340; Ib. 243; 3 Monroe, 126; 3 Atkin. 356; Edhill vs. Hayword.

The decree is, therefore, reversed, and the cause remanded with instructions to enter a decree in favor of Dana, to be satisfied out of the stock in Crockett's own name.

Dana, for plaintiff; *Haggin*, for defendants.

ORDER OF CT'Y COURT. Case 71.

Coffee, &c., vs Watt.

Error to the Green county court.

Orphans. Apprentice. Statute. County Court.

April 22.

Judge UNDERWOOD delivered the opinion of the Court.

It is error in the county court to bind out any orphan or poor child, under the statute of 1793, 2 Dig., 1040, until the parent, next friend,

THE county court of Green, at their June term, 1828, made an order directing their clerk to bind Yidner Coffee, and seven others, children of Annanias Coffee, (a poor person, as stated in the order) to James Watt; in pursuance of which order, the clerk executed indentures binding the children. At the July term, 1828, of said court, Annanias Coffee moved the court to set aside the order of the June term, and to award a summons against him, to shew cause, why

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his children should not be bound out. This motion was overruled. The case has been brought to this court, and we are called on to decide, whether the children have been legally bound out or not. The proceedings in the county court, were no doubt intended to be carried on, under the authority of the act of 1793, making provision for binding out poor orphans, and such other children whose parents are incapable of supporting and bringing them up in honest courses; see 2 Digest, 1040. By that act, county courts are authorized, "if to them, it shall seem right *after summoning the next friend of, or person with whom such poor orphan, or other child shall reside*, to make an order, directing their clerks to bind out," &c. It is manifest, that the act directs the summoning of the next friend or person, with whom the child resides, to give such friend or person, an opportunity to shew, that the child is furnished with comfortable food and clothing, and that it will be brought up in honest courses. If this can be shewn, the court ought not to take the child from the custody of its parents or friends, and according to any rational construction of the act, it is not until *after summoning the next friend or person keeeping the child* for the purpose of having these matters investigated, that the court is authorized to direct their clerk to bind out. The records of the county courts, should always show, that the court, after issuing the summons, and bringing the parent or next friend or keeper of the child, before the court, to shew cause, made the order for binding out. In this case so far from the record shewing, that the court brought Annanias Coffee, the parent, before them, by summons, to shew cause, why his children should not be bound out, it shews, that at the term, after the order was made for binding his children, he appeared, requested that the order might be set aside, and a summons awarded against him, so that he might have an opportunity, of making defence, before his children were taken from him. This the court refused. We are clearly of opinion, that the proceedings of the court were illegal. There is no subject so well calculated to excite strong feelings, and intense interest, as the separation of parents and children. The affections and sympathies of the human heart revolt against it, and

or person having the care of such orphan or child, shall have been summoned, and makes default, or fails to shew cause against it. The record must shew the statute to have been pursued.

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Com'th. &c. vs. Williams, &c.

it ought not to be done, unless the welfare of the child renders it a matter of necessity. The legislature did not intend it should be done except in such a case, and the legislature has secured to the unfortunate poor parent, the privilege of being heard, before he is striped of the last comfort which may remain to him, his children. It was wrong in the court to prejudge the case, and to conclude, that the father could not shew; that his children ought not to be bound out. They should have brought him before them, heard his proof, and then decided. In as much therefore, as the law has not been complied with, by issuing a summons, it is our opinion, the order of the Green county court, entered at their June term, 1828, directing their clerk, to bind out the plaintiffs in error and the indentures of apprenticeship, made in pursuance thereof, are illegal.

Wherefore, the said order is reversed and set aside, and the said indentures are also set aside, and shall henceforth be held for nought.

Denny, Attorney General, for plaintiff.

Bastardy.

The Commonwealth for Charlotte Robbins vs. John Williams, &c.

Case 72.

Error to the Henry County Court.

Bastardy. Bond. Removal. Power of County Court.

April 23.

Judge Robertson, delivered the opinion of the Court.

Proceedings in the county court, from 1824 to 1827, including various orders.

On a warrant prosecuted by Charlotte Robbins against John Williams, charging him, with being the father of her bastard child, the county court adjudged that he should pay for the maintenance of the child $200 in ten annual installments, of $20 each. Whereupon he executed in court, a bond, with Thomas M. Ballard his security, payable to the commonwealth, with a condition reciting the foregoing facts, and rendering the bond void, on the payment to the sheriff (who was appointed by the court to collect and appropriate the money) of the installments as they should become due. This bond was executed at the October term 1824 of the court.

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In October 1826, an order was made by the court, quashing certain proceedings, (but what does not appear) and directing the sheriff to pay over to the mother, the installments, as soon as collected, if she should continue to maintain the child well.

At the April term, 1827 of the court, a motion being before the court, in the name of the commonwealth on sufficient notice, for a judgment against the obligors on the bond, for several installments, which remained unpaid, Charlotte Robbins, was required to give security for costs, on the ground, that she had removed to Indiana. The bond was executed with approved security, and thereupon, the court made the following order, "the defendants by their attorney, moved the court, to dismiss all further proceedings herein, *on the ground that the said Charlotte Robbins, hath removed herself, together with her bastard child, without this commonwealth,* which motion being objected to, &c., *and argument being heard by the court, all further proceedings herein, are by the court, ordered to be dismissed accordingly.*

To reverse this last order, this writ of error is prosecuted.

A court of original jurisdiction has no control over its orders or judgments, unless during the term at which rendered or entered up.

Few such records of judicial proceedings can be shewn, as the one now before us. But with all its blunders, it cannot prove that the court, by any retroactive order, has destroyed the legal obligation of the bastardy bond, or deprived the commonwealth of its right to enforce it, for the benefit of the mother and her illegitimate child. This, it seems, that the county court tried to do, and would have done, if it could. But its power was insufficient.

The order for quashing proceedings, in 1826, can have no effect on this case, although the record does not shew what proceeding was quashed; yet it is evident, that it was some motion, made by some of the parties which the court would not entertain. The whole order taken together, shews this. The court did not certainly mean to quash the proceedings of 1824. They were beyond its power. It had no control over its judgment of 1824.

The order dismissing the motion, cannot be defended by any such reason, as that furnished by the court; and we have detected no other, which can sustain it.

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COMMON'TH. vs. WOOD.

The removal of the mother and child, did not discharge the obligation of the bond, or release the obligors from their undertaking.

When an allowance has been made for the support and maintenance of a bastard, the removal of the mother and child out of the state, does not discharge the bond given under the statute, for the payment of the sum allowed,

The object of requiring the bond, is not to exempt the county or the state from the maintenance of the bastard, as a pauper; it is to benefit and assist the mother, and to enforce on the father, a natural obligation, to sustain his own offspring, and all the proceedings for this end, are civil and not criminal; Schooler vs. the commonwealth, Lit. Sel. Ca. 89. We cannot imagine, how a removal from the county, or even from the state, of both the mother and the child, can nullify, or in the slightest degree impair the bond in which the father has engaged to contribute to their comfort and support. Nor is any defect perceived in the bond. The court had a right to direct, that the money should be paid to the sheriff, or any other person, for appropriation, under its supervision and control. And it was not improper, that the condition of the bond should require the installments to be paid to the sheriff. This only made the bond speak the truth. If any installments should not be paid as soon as due then the penalty on the bond was forfeited to the commonwealth, and suit might be brought in her name on the bond. The bond is made payable to the commonwealth, this is conformable to the act of Assembly, and is all that is required by it. The bond is good, the motion was proper; its dismission was erroneous.

Wherefore, the order dismissing the motion is reversed and set aside, and the case remanded.

Denny, Attorney General, for plaintiff; *Crittenden*, for defendants.

COVENANT.

Commonwealth vs. Wood.

Case 73.

Appeal from the General Court; HENRY PIRTLE, Judge.

Statute. Covenant.

April 23.

Judge ROBERTSON, delivered the opinion of the Court.

First sec. of session acts

"IT shall be the duty of the secretary of state, by and with the advice and consent of the

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Governor, for the time being, to sell or exchange such portion of the decisions of the court of appeals, now published, or which may hereafter be published, and acts of assembly or other books belonging to this commonwealth, as they may deem expedient, and which may not be otherwise appropriated by law, and out of the proceeds thereof, purchase such books, charts or maps as they may think proper," 1st section of session acts, 1820; 1 Digest, 859.

1820, 1 Dig. p. 859.

"Received of the secretary of state, fifty copies of the Digest of the laws of Kentucky, for which I am to allow the state $6 50 per set. July 28, 1823.

W. WOOD."

The writing signed by Wood.

On this writing, an action of covenant was brought, in the name of the commonwealth of Kentucky, against Wm. Wood; to which he demurred. The court sustained his demurrer, and thereupon, gave judgment against the commonwealth.

Character of suit, demurrer and sustained.

The objections which are urged to the declaration, are: 1st. That covenant is not the proper form of action. 2d. There is no averment of the assent of the governor. 3d. It does not appear to what secretary of state the receipt was executed, and to what state the value of the books was to be allowed. 4th. The contract in this case, is unauthorized by law, and is consequently void. And, 5th. That the suit could not be maintained in the name of the commonwealth, but should have been brought in that of the secretary. If there are other objections to the declaration, they have not been suggested; and we have been unable to imagine any others. None of those made by the counsel, are sufficient to sustain the demurrer.

Objections to the declaration.

The writing, being a specialty, and acknowledging a liability, is the basis of an action, and either debt or covenant would be the proper remedy for a breach. The covenant to account for the books, is express, and we are not driven to the necessity of implying a covenant, if such implication would be indulged.

Debt or covenant, the proper action upon a specialty acknowledging a liability.

It was not necessary to aver the assent of the governor. The act of assembly is directory to the secretary. A sale or exchange of books by him, without the advice or concurrence of the governor, would vest

Power given to the Secretary of state, to sell or exchange books

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COMMON'TH. vs. WOOD.

with the assent of the governor. His acts bind the state even without governor's assent. Not necessary in a suit to aver assent. Nor need the person dealing with the secretary enquire whether the Governor assented.

the title. A person who purchases or exchanged books, is not bound to ascertain that the governor has approved the contract. This is to be presumed. The state is bound by the contract of the secretary, and the purchaser must be bound also. Besides, the assent of the governor is implied until the contrary appears. Can Wood keep the books, and be exonerated from paying their stipulated value? If he is not liable on his covenant, he could be made liable in assumpsit, for the appropriation of the books to his own use. But a resort to such a remedy is not necessary, and would not be proper, as Wood is bound by a covenant, in writing. The state cannot vacate or object to the sale. It gave the authority to its secretary, and a purchaser cannot be required to know, that the governor has advised or assented to the sale.

An administrator has an authority to sell slaves, only if it shall be necessary for payment of debts; nevertheless, a sale by him, when it is not necessary, vests the title in the purchaser. This is a stronger case. If the secretary acted improperly, he is responsible; but Wood cannot be prejudiced, by any omission by the secretary to consult the governor. The state has not objected to the sale. It could not do so, if it would. Wood cannot, therefore, object. At all events, it is not necessary to aver the governor's assent in the declaration.

The writing executed by Wood sufficient to prove that he received the books from the secretary of state of Kentucky, and only binds him to account to Kentucky.

There is still less in the third objection. We think that it appears with sufficient certainty, that Wood received the books from the secretary of state of Kentucky. He is in no danger of ever having to account to any other state. He acknowledges in Kentucky, that he received from the secretary of state fifty copies of the Digest of the laws of Kentucky. It is not probable that the secretary of any other state had fifty copies of the Digest of Kentucky, for sale, nor is it probable that Wood would have gone to any other state to purchase them, if they had been for sale elsewhere; or that on the receipt of the books, an acknowledgment that he was "*to allow the state* $6 50 *a set*," would have been given or accepted. It is as evident that this receipt was given to the secretary of Kentucky, as if it had said so expressly.

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The fourth objection requires no further notice. The act of assembly, and what we have already said, are enough to show that a sale by the secretary was valid. BATE vs. LEWIS' EX'RS

As to the last objection, we have no doubt that it is not sustainable. The suit was properly brought in the name of the commonwealth. The covenant is express to allow to the state the price of the books. If it were not express, such would be the implication of law. The legal right is in the commonwealth, and the books belonged to the commonwealth; therefore, the action is maintainable in the name of the commonwealth. 1 Chitty, 3-4; 1 Saunders, 153. Suit properly brought. The covenant is expressly to "allow" to the state $6 50 per set for the books.

The secretary of state being the agent of the commonwealth, and having no personal interest, could not sustain a suit in his own name, even if the covenant had been express, that Wood would pay to him the price of the books. 1 Chitty, 5; 1 Hindman, 471; Ib. 61. The secretary was agent without personal interest.

And if the secretary had had any personal interest which would have allowed him to sue in his own name, still a suit could be maintained in the name of the commonwealth, (the principal.) In such case either the principal or agent might sue.

The judgment of the general court is reversed, and the cause remanded for new proceedings.

Denny, Attorney General, for commonwealth; *Crittenden* and *Brown*, for appellee.

Bate vs. Lewis's executors.

COVENANT.

Appeal from the Nelson Circuit; PAUL I. BOOKER, Judge. Case 74.

Practice. Pleading. Demurrer. Evidence. Jury. Verdict. New trial. Instructions.

Judge ROBERTSON, delivered the opinion of the Court. April 24.

WE have never before seen such a record as the one in this case. An action of covenant was brought by Bate, in 1823, against Lewis's executors, on a covenant charged to have been executed by their testator, for $14,000. History of the pleadings.

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BATE vs. LEWIS' EX'RS

At the September term, 1821, of the court, the defendants filed three pleas.

At the June term, 1822, the plaintiff demurred to the first plea, and thereupon leave was given to the defendants to withdraw the plea, to which the plaintiff excepts.

Plea No. 4 was then filed, to which plaintiff objected, but his objection being overruled, he replied; and it seems by a bill of exceptions, that pleas two and three were then withdrawn.

At the March term, 1824, the court suffered the defendants "to abandon the issue made on the fourth plea," and to lodge two additional pleas, styled six and seven. To this the plaintiff excepted.

At the June term, 1824, the court permitted the defendants to file pleas, six and seven, to which the plaintiff excepted.

These pleas are in effect, the same, both being virtually, special pleas, of *non est factum*, as were pleas one and four, which had been withdrawn. The plaintiff replied to pleas, six and seven; the defendants demurred to the replications, and the court sustained the demurrer. To this, the plaintiff also excepted; but by leave of the court, filed other replications; whereby issues were supposed to be made up.

Jury and verdict for def't.

At the June term, 1825, a jury was sworn to try "*the issue*," and found a verdict for the defendants.

Motion for new trial by pl'tff., and overruled.

The plaintiff moved for a new trial, principally on the ground, that the verdict was contrary to evidence; and also, that the court erred in giving instructions to the jury, and in its refusing to give others asked for by the plaintiff; and also, that the court erred in excluding a record offered by the plaintiff.

The motion being overruled, the plaintiff appealed to this court, and has assigned the following errors, viz:

The errors assigned.

1st. It was error to permit the defendants to abandon the issue on plea four. 2d. It was error to permit pleas six and seven to be filed. 3d. It was wrong to sustain the demurrer to plaintiff's replications. 4th. The court erred in rejecting the record offered

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by the plaintiff. 5th. It was error to swear the jury to try "*the issue*," when there were two issues. 6th. The issues were immaterial. 7th. The court erred in refusing the instructions asked for by the plaintiff, and in giving others.

The legal effect of the pleadings.

In all this labyrinth of pleading, we see no fatal error, although many irregularities are exposed. The cause was unaccountably protracted. No sufficient motive is perceived for the extraordinary course manifested by the counsel, in their efforts to avoid a plain and direct issue between the parties. An issue of *non est factum*, or of *escrow*, was the legal effect of the pleadings, when closed, and would have been of other attempts, which were permitted to be ineffectual.

The counsel, however, with a knowledge of all the facts, and for reasons no doubt satisfactory to themselves, have throughout, struggled to evade a direct or a general issue; and after unprecedented success in forcing each other for more than four years, closed on pleas six and seven; the issues on which are substantially the same, and both, in effect, the general issue, of *non est factum*.

Circuit court has discretion over the pleadings of the parties, uncontrolable, unless manifest injustice be done.

The court had a discretion in regulating the pleadings, in the exercise of which, this court cannot control it, unless there had been palpable abuse, to the prejudice of the plaintiff. In the leave given to the defendants to withdraw pleas and file others, we see nothing prejudicial to the plaintiff, except the consequential delay, and for this the judgment cannot be reversed.

The plaintiff waived all objections to the decision on the demurrer, by replying over to the pleas.

If a record offered in evidence, do not conduce to sustain or defeat the issue; to reject it not error, though between the same parties.

There is no error in the rejection of the record offered. It was a record of a suit brought by the defendants against the plaintiff, for a breach of his covenant, in the writing on which this suit is brought. The suit by the executor against Bate, was instituted in 1825; and it does not appear whether it was founded on the same covenant exhibited in this case, or on its counterpart. The motive of the plaintiff for offering this record was, to show that the testator had accepted the covenant on the part of Bate, and consequently had executed and delivered, on his own part, that on which this suit is based.

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If the record could, in any degree, have tended legitimately to create this presumption, it would have been relevant testimony. But this it could not do. It would not show that the covenant to which it refers, is or is not, the identical one set out in this suit. The best and only evidence of this fact, would be the original covenant itself, which was filed, if any were filed.

The institution of the suit by the executors, is not evidence that they found the counterpart of the covenant among the papers of their testator, nor that the suit is founded on such counterpart.

When more than one *issue*, to swear the jury to try "*the issue*" not error.

It was not error to swear the jury to try "the issue." This expression is collective, when there are more issues than one. When a jury is sworn to try "*the* issue," in a case in which there are several issues, it is intended that they shall try the whole case; and for this purpose all the issues are considered as one. Worford vs. Isbell, 1 Bibb, 247; Halcher vs. Fowler, Ib. 337. Besides, in this case, although there were two issues in form, there was only one in effect.

The issues were not immaterial. They were very informal; but that was the fault more of the plaintiff than of the defendants. There were two issues in the cause; if issue mean as we suppose it does, an affirmation of a material fact on one side, and a negation of it on the other.

Nor can we admit that the court erred in the instructions which it gave, or in its refusal to give them, as requested by the plaintiff.

The hypothetical instruction given not objectionable; to have instructed the jury absolutely would have been error.

The substance of the instructions given, is, that if the testator delivered the covenant unconditionally, as his deed, the jury should find for the plaintiff; but that if he did not deliver it, or it was not to be obligatory until something should be done by the plaintiff, which was never done, they should find for the defendants. There can be no good objection to these instructions. Those asked for by the plaintiff, demanded of the court, to decide on the proof, that certain facts established conclusively that the covenant was the act and deed of the testator. The court acted correctly in modifying the instructions as it did. Thus the whole law of the case was laid before the jury, in a simple and intelligible form.

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The evidence in the case, is of such a character, as to justify a verdict by a jury, for either plaintiff or defendants. If they had found for the plaintiff, the court ought not to have awarded a new trial; as they have found for the defendants, this court cannot control the verdict, nor the judgment of the circuit court upon it. The evidence was such as to authorize the verdict which was given.

HARRISONS vs. BAKER.

When the evidence is such, that a jury might find for pl'tff. or def't., no matter what the verdict, the court will not disturb it.

We are, therefore, of opinion that there is no error in the record in this case; wherefore, the judgment of the circuit court is affirmed.

Wickliffe and *Denny*, for plaintiff; *Darby*, for appellee.

Harrisons vs. Baker.

TRESPASS.

Error to the Fleming Circuit; W. P. ROPER, Judge.

Case 75.

Instructions. Bill of exceptions. Principles of Practice.

Judge UNDERWOOD, delivered the opinion of the Court.

April 24.

THE plaintiffs in error, and also plaintiffs in the circuit court, brought an action of trespass *quere clausum fregit* against the defendant. The declaration, contains two counts; one alleging the destruction of timber and herbage, the other avers the expulsion of the plaintiff by the defendant, from the possession, use and occupation of the land for a long time, to-wit: from the —— day of ———— to the —— day of ———— and that he, during that time, had taken and received the issues and profits of the land. There were two trials in the circuit court, in each of which the defendant succeeded, and the plaintiffs, have brought up the case upon a solitary exception, filed during the progress of the last trial, questioning the correctness of instructions given to the jury. These instructions were, "that if the improvements made by the defendant, and upon the land at the time it came to the possession of the plaintiffs, exceeded in value, five years rent of said land and improvements, that, then the jury ought to find for the defendant, whether the defendant had title in law, or in equity, or even if he had no title at all to the land, upon which he made

Statement of the case.

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HARRISONS vs. BAKER.

said improvements," and, "that if the said improvements, so made, even without title, in law or in equity, amounted in value, to more than five years rent, that the plaintiffs could not set off the value of the rents and profits, accruing by the defendants use and occupation of the land, before the five years, against improvements made on the land."

When the bill of exceptions does not exhibit such facts, as would entitle the pl'tff. to recover, if instructions at the instance of the def't. had not been given, the court will not presume him to have been prejudiced; and if the evidence on which instructions are intended to bear, be not presented by the record, the court will not adjudge the instructions to be erroneous.

We do not deem it important, to investigate the correctness of the opinions expressed in the foregoing instructions. Whether a *bona fide* improver of lands when sued for mene profits in an action of trespass, may give in evidence, the value of his improvements, under the general issue, by way of set off against the rents, and whether, if it can be done, the plaintiff should be precluded from shewing, that the improvements had been amply paid for, by the rents, and profits accruing in years preceeding five, next, before the commencement of the action, are questions, which we will refrain at present, from expressing any opinion upon; because, be the law either way, the decision must still be an affirmance of the judgment of the circuit court in this case. The bill of exception filed in the progress of the last trial, does not set out any of the evidence then given. Consequently, we can not tell, whether the plaintiffs proved title or possession, in fact; and if they did, we cannot tell, whether they proved any trespass, on the part of defendant. We cannot therefore perceive, what effect, the instructions given, did have on the minds of the jurymen, in forming their verdict. Before we reverse a case, it must be made to appear, by a full or partial history of the proceeding in the inferior court, that injury has been inflicted on the party complaining. We cannot indulge in conjectures, that it is possible, or even most probable, that he has been injured. As he has the means of shewing it positively, if he does not do it, by setting out the facts, necessary to shew it, his failure should be taken as a circumstance against him. It should at least operate so far, as to relieve this court from imagining a state of case where injustice has been done him. Cases might happen, where the face of the pleadings, would enable this court to detect a mischievous instruction given to the jury, operating to the prejudice of one of the parties. In such a case

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it would not be necessary for the party injured to do more, than to except to the instruction given. But such is not the present case, for aught that appears to us, the plaintiffs have not been injured. They have not shewn, that the jury should have found for them, if the instructions had not been given. The record in this case, is burdened with near one hundred pages, containing exceptions, filed by the defendant, in the progress of the first trial, which have nothing to do with the exceptions filed by the plaintiffs on the last trial, and which cannot aid the plaintiffs in the prosecution of their writ of error. The case of Blue vs. Kibbey, 1 Monroe, 196; is an authority in support of the doctrines here advanced.

M'Kinney, &c. vs. Common'th.

The judgment of the court below is affirmed, and defendant in error, must recover his costs.

Reid, for plaintiffs; *Haggin*, for defendant.

M'Kinney, &c., vs. Commonwealth.

Assumpsit.

Error to the Franklin Circuit; Henry Davidge, Judge. Case 76.

New trial. Discretion. Verdict.

Judge Underwood delivered the opinion of the Court. April 24.

The commonwealth instituted an action of assumpsit, againt the plaintiffs in error, to recover for goods sold them, by the agent of the penitentiary, as is alleged in the declaration. A trial was had and verdict and judgment rendered for the defendants. A motion was made to set aside the verdict and judgment, upon the ground, that the verdict was against the evidence; that the agent of the penitentiary was surprised; and that he had discovered new evidence of importance. The motion prevailed, and on the second trial, the commonwealth obtained a verdict and judgment in her favor. Statement of the case.

Two exceptions are now taken to the proceedings in the circuit court. 1st. That the court erred in granting a new trial. And 2d. That the verdict and judgment obtained, are for too much. Motions for new trials, are addressed to the sound legal discretion of the court. Haggin vs. Christian, 1 Marshall, 579. In

When the justice of the cause has not been fairly and fully tried, owing to some omission, over-

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M'KINNEY, &c. vs. COMMON'TH.

sight or surprise which may be excused or obviated, a new trial should be granted. Such applications are addressed to the sound discretion of the judge.

the exercise of discretion, it is difficult to prescribe any set of fixed rules, applicable to all the cases which arise, and in consulting the adjudications on the subject, we find some, where considerable latitude has been allowed, and others, which savour of much rigour. In Mahan vs. Jane, 2 Bibb, 33; it is laid down, that "whenever there are strong probable grounds to believe, that the justice of the cause has not been fairly and fully tried, a new trial ought to be awarded." The circuit judge must apply this rule, taking care not to tolerate negligence by its lenity, and guarding against the success of iniquity, when it gains an advantage from the omission of something, which seemed not to be required, or for the neglect of which, a good excuse can be given. We must presume, that the court, properly exercised its discretion, unless the contrary is shewn. In this case, we think the weight of evidence, was against the finding of the jury in the first instance. Indeed it does not appear, that the defendants offered any evidence. This consideration connected with others, induce us to the opinion, that the circuit judge granted a new trial correctly; and we the more readily adopt this opinion, because, on the 2d error assigned, we shall reverse the case and order a new trial, when the parties will have a full opportunity to get justice.

Verdict and judgment in favor of pl'tff. for more than he demands in his writ and declaration erroneous.

The writ and declaration, claim $100 damages, the verdict and judgment, are for $113. It is settled by repeated adjudications, that in actions, sounding in damages, the plaintiff cannot recover, more than he claims. In actions of assumpsit, for goods sold at liquidated prices, or for any liquidated sum, to say the least, it is discretionary with the jury, to allow or refuse interest. In contracts for property, not complied with, the jury has the same discretion. Henderson vs. Stainton; Hardin 119. In Cartmill vs. Brown, 1 Marshall, 576, this court, has strongly inculcated the doctrine, that juries were bound to give interest on all liquidated sums due, evidenced by writing, or parol. In South vs. Leavy, Hardin, 519, it is settled, that interest cannot be allowed, on unliquidated accounts for goods sold. Whether the articles in the present case, were sold at fixed prices or not, we cannot tell, as the eivdence on the last trial is not spread on the record,

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and we cannot therefore decide, whether there is any error or not, in regard to interest. But no matter from what cause, the jury have given the plaintiff more than was claimed, and that is error. JOHNSON vs. M'GILVARY.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

Crittenden, for plaintiffs; *Denny*, Attorney General, for defendants.

Johnson vs. M'Gilvary.

CHANCERY.

Appeal from the Christian Circuit; B. SHACKLEFORD, Judge. Case 77.

Fraud. Purchaser with notice. Equitable title. Legal title. Conveyance. Commissioner.

Judge ROBERTSON, delivered the opinion of the Court. April 25.

BENJAMIN P. CAMPBELL, holding, as assignee, a survey in the name of Combs, for thirty acres of land in Christian county, executed his bond with Porter and another as his securities, binding him, for the consideration of $50, to make a general warranty deed therefor, to the appellee. Afterwards, being a partner of F. C. Sharp, in the appropriation of vacant land, Campbell procured a survey to be made on the same thirty acres, in the name of Sharp, *but for his own benefit*, and sold it to the appellant for $59, who obtained a patent for it in his own name, before the patent on Combs' survey, (which was procured by the appellee,) issued in the name of Combs. Statement of facts alleged in complainant's bill.

The appellant purchased with full knowledge of the equity of the appellee. This is proved by the depositions of Sharp and Reynolds, and also, by the fact that he was a subscribing witness to the bond from Campbell to the appellee.

Campbell having refused to convey to the appellee, this suit in chancery was brought to compel the appellant to release. Campbell, his security Porter, and the appellant were made defendants.

The bill, charging the foregoing facts, and a fraudulent combination between the appellant and Campbell, is taken for confessed against the latter; no notice is taken of Porter after service of *subpœna* on him. Bill taken for confessed against Campbell.

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JOHNSON vs. M'GILVARY.

Johnson's answer.

The appellant answers, and intimates that the appellee had given nothing to Campbell for his bond; denies fraud, seems to admit notice of the appellee's bond, but attempts to evade its effect, by averring that Campbell assured him that the appellee had no equity.

Decree of the circuit court.

The circuit court decreed, at its April term, 1827, that Campbell and Johnson should convey the thirty acres of land, to the appellee, by deed of special warranty, on or before the 20th day of May succeeding; and that on their failure to do so, a commissioner, appointed by the decree for that purpose, should make the deed.

In a suit against the holder of legal title, acquired with notice of the prior equity of compl'nt.

We perceive no error in this decree, of which the appellant has any just right to complain. The appellee certainly established a clear, equitable right against the appellant.

not necessary that compl'nt should prove payment of the consideration, when his vendor is silent.

It was not necessary to prove the payment to Campbell. Whether the payment had been made or not, was immaterial to the appellant. Campbell did not complain. By not answering, he admitted the allegations of the bill, one of which was, that the $50 had been paid to him. If Johnson could require proof of the payment, Campbell might, by admitting it in an answer, have furnished that proof. For although it is a general maxim, that the answer of one defendant is no evidence against another, such a case as the one supposed, is an exception. But the bond acknowledges the payment of the consideration. This is *prima facie* evidence of the fact, and is, in this case, sufficient for Johnson. Mitchell, &c. vs. Maupin, 3 Monroe, 188.

The bill being taken for confessed against Campbell, would alone be sufficient evidence of payment of the consideration. Fraily vs. Langford, 1 Mar. 363.

It was not necessary to make Porter a party. The object of the bill was to obtain the title from Johnson. Porter was only security for Campbell, and therefore, not a necessary party. 2 Bibb, 273; consequently there was no error in decreeing without any notice taken of him.

Not error, in a decree for

Nor was it erroneous to appoint a commissioner to convey before the term succeeding that at which the decree was rendered. The appellant could not be

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prejudiced by a conveyance by the commissioner, because his deed would have no more effect than that of the appellant, which the court had made it his duty to make, by its decree. This is not like a decree for a deed by a commissioner, on failure to pay money. In the latter case, the defendant in the suit may be seriously injured by such decree. He may have paid the money or tendered it, before the execution of the deed by the commissioner; notwithstanding which, the deed might be operative and vest the right in the purchaser. It would be wrong, therefore, to constitute the commissioner a judge between the parties, of the fact of payment or the effect of a tender. Besides, the money should be paid in court. Not so in this case. Hence the decree for this last cause, is not erroneous. 1 Marshall, 438; Ib. 368.

title to land, to appoint commissioners to make conveyance, in vacation, upon failure of him against whom decree is rendered, otherwise, when the decree is for a deed upon failure to pay money.

These being the only errors assigned, or which could be assigned, the decree of the circuit court is affirmed.

Nall's heirs, &c., &c. vs. Combs.

CHANCERY.

Error to the Scott circuit; JESSE BLEDSOE, Judge.

Case 78.

Non-Resident. Defendants. Publication. Revivor. Practice. Parties. Specific performance. Compensation in damages.

Judge ROBERTSON, delivered the opinion of the Court.

April 25.

Statement of facts.

In 1801, Combs and Walker, both of Scott county, entered into an article of agreement, whereby, in consideration of a negro man, and one hundred and a half acres of land, sold by Combs to Walker, the latter agreed to convey to the former, a tract of eighty-five acres, and another of ninety acres; all three of which tracts, are in the said county. It seems that the eighty five acres have been conveyed; that Walker was in the possession of the tract sold to him by Combs, and sold it to others who, or those claiming by purchase from them, have enjoyed the use and possession of it ever since.

Walker agreed that he would not require a deed from Combs, until he (Walker) could make a title to the two tracts, sold to Combs; and that Combs should

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NALL'S HEIRS vs. COMBS.

be entitled to as many acres of the one hundred and a half acres, as there should be a deficit in the ninety acre tract, if there should happen to be any.

Compl'nt's. bill.

Combs filed his bill in chancery, in 1811, alleging that Walker had purchased the said ninety acres from Fenwick, and held his bond for a title; that Fenwick held the bond of Martin Nall, the patentee, for a title to him, that no title had ever passed from Nall, and that Walker had failed, and refused to procure the title for him to the ninety acres. Walker, Fenwick and the heirs of Nall are prayed to be made defendants, and the bill prays a specific execution of the contract for the ninety acres, and a compensation for any deficiency, that might appear in the quantity.

Amended bill.

An amendment is afterwards filed, alleging that there were only thirty-eight acres saved of the ninety acre tract, and asking for a recision of the contract or a decree for as much of the ninety acres, as could be conveyed, and for as much of the one hundred and a half acres, as the number of acres deficient, in the ninety acre tract, and John Branham, who is alleged to be in possession of the one hundred and a half acres, by purchase from Walker, is made a defendant.

Walker dying before he answered, the bill is revived, by bill of revivor against his heirs and personal representatives; some of whom answer and require proof of all the allegations of the complainant, against the others, the bill is taken for confessed, on a regular publication.

Decree of the circuit court.

The circuit court decreed a conveyance of the title by Nall's heirs, for forty-three acres of the ninety acre tract, (that appearing by a report of the surveyor to be the quantity remaining) and also decreed an extinguishment of all title, except that of Combs, to forty-seven acres, of the one hundred and a half acre tract, sold by him to Walker, which forty-seven acres, had been designated by commissioners appointed by the court for that purpose.

Publication against non resident, for 8 weeks, not sufficient; it should be for two months.

This case has been very negligently prepared; and the court has fallen into many errors, in its progress. James Nall, one of the heirs of Martin Nall, being a non-resident, an attempt was made to bring him be-

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fore the court, by a publication. But the order having been published only eight weeks; he was therefore not regularly a defendant.

Revivor, by an order, not good, unless the decedant had answered There must be bill of revivor and notice.

The only revivor against Fenwick's heirs, was by order. As Fenwick had not answered in his lifetime, the bill could not be revived against his heirs, without a bill of revivor, and had the attempt to revive been by bill instead of the order, still the proceeding could not have had the effect of making the heirs defendants, because, as they were non-residents, the publication against them, should have been for two months; and the publication of the order of revivor, was for only eight weeks.

The record shews, that the heirs of Thomas Branham, are necessary parties. No attempt was made to make them parties, although a paper is brought into the cause, incidentally, purporting to be the answer of some of them.

For these reasons, as well as others, that may be assigned, the decree is erroneous; and the bills might have been dismissed without prejudice. The case was certainly not prepared for a decree on the merits. And if all necessary parties had been before the court, there could have been no decree for the complainant, consistently with the state of the case on the record.

If a part of the def'ts. require proof of the allegations of a bill, there can be no decree against them, without sufficient proof.

As a part of Walker's heirs, require proof of the complainants allegations, there ought to have been no decree, without sufficient proof, even if all the proper parties had been before the court. And there is no proof, except the exhibition of the bond, in the bill.

A, claiming prior equity, sues B, the holder of legal title; to recover against B, A must prove that B is a purchaser, with notice of his equity.

Whether Combs had ever made a deed for the one hundred and a half acres, does not appear. If he had, and the Branhams had acquired from Walker the agent, title without notice of Combs' equity, there could be no decree to their prejudice. This point however, seems not to have been thought of in the preparation of the case: and is only mentioned now, for the advantage of the parties, in any future contest between them. But it is probable, that the title is in Combs.

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NALL'S HEIRS vs. COMBS.

Before the chancellor will interpose to disturb long enjoyed security of possession, the right of compl'nt. to specific execution must be made out in every particular.

Under all the facts apparent in the record, whatever may be Combs' equity against Walker, it should be made, in every particular, indisputable against the others, who are interested, before a decree could be expected, for any portion of the land, sold by Combs to Walker. Because, although Combs may elect to accept a decree, for whatever can be conveyed, of the ninety acre tract, and to ask damages for the deficit, yet as he would, on full proof, have complete remedy at law, for a breach of covenant, it would be more just and equitable, to leave him to his legal redress, than to disturb, on questionable grounds, the long possession of others, and thereby open the door, to further litigation, between those who have reposed in confident security for many years. If Combs could not recover at law, he ought to have no relief in equity. If he could recover at law, he might be freely indemnified. Nevertheless, as against Walker's heirs, if he can clearly establish, as he must do, the allegations of his bill, he would have a right to relief in chancery. And if he shall also shew, unquestionable equity against the holders of the one hundred and a half acres, and *sufficiently* prove, a deficiency in the ninety acre tract, *pro tanto*, he might obtain relief specifically, according to his contract.

The decree reversed, with directions to give the complainant time to bring the proper parties before the court, and proceed, *de novo*, or have his bill dismissed without prejudice.

The decree is reversed, and the cause remanded, with instructions to the circuit court, to make a rule on Combs, that he bring all the proper parties (shewn to be such, in this opinion) before the court, within a reasonable time, to be designated in the rule, and that, if he fail, his bill shall be dismissed, without prejudice. If he shall comply with the rule, then the cause must progress *de novo*, as on service of process on the original bill, except as to those who were regularly made parties, before the decree was rendered. In reference to them, no new proceeding is required. But in the future progress of the case, they will of course, have all the rights, to which they were entitled before it was heard, and decided by the decree now reversed.

The plaintiffs must recover their costs in this court.

Darby, for plaintiffs.

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Love vs. Cofer et al.

CHANCERY.

Error to the Hardin Circuit; PAUL I. BOOKER, Judge. Case 79.

Commonwealth's paper. Current money. Mistake. Fraud. Parties. Dismissal without prejudice.

Judge ROBERTSON delivered the opinion of the Court. April 25.

THIS is a suit in chancery, instituted by William Love against Letitia Cofer, as administratrix of her deceased husband, to be relieved from a judgment, obtained by her on a note, executed by himself and another. The bill alleges, that the note was given, in consideration of personal property, bought at a public sale by the administratrix, which was proclaimed to be, and understood by all who were present, to be for commonwealth's paper; that the sale was on the 15th of November, 1822, on a credit of twelve months, and it was announced by the crier, that commonwealth's paper would be received, if, at the time of payment, there should be no depreciation; that it did not depreciate, and was tendered by the appellant, on the day of payment, and that when he executed the note, which is for "current money," he "*has no recollection of reading the note, confiding in the integrity of those who managed the sale.*" There is no allegation of fraud or mistake, unless they can be infered from the foregoing facts.

Bill to be relieved from a judgment for specie, upon a note for 'current money;' the allegation, that the consideration was commonwealth's paper.

The answer requires proof of all the material allegations of the bill; and the evidence is very strong, if not conclusive, in support of the facts charged.

Def'ts. answer.

An injunction having been granted, it was dissolved with damages, on the final hearing, and the bill was dismissed absolutely. If the bill exhibit equity on its face, the decree was improper. It was therefore, either wrong to grant the injunction, or wrong to dissolve it.

It is very questionable, whether the allegations of the bill, are sufficient to authorize the introduction of parol testimony, according to any principles, established by this court, or known to have been recognized elsewhere. It is not alleged, that the obligors signed the note through mistake, believing that it was drawn for paper, or that there was any agreement, that it should be written expressly for paper, or that, in *its execution*, there was either fraud or mistake. And we

To justify the admission of parol testimony, in contradiction to the stipulations of a written instrument, *fraud* or *mistake*, in its ex-

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GRAHAM & Co. vs. NOLAND'S A'S

doubt whether, either fraud or mistake, in the execution of the note, can be reasonably inferred from the bill. This however is not material. The note is not exhibited; the record of the common law suit, does not appear. The security in the note, is not a party to this suit. It is necessary that he should be a party.

ecution, must be alleged.

The security to a note should be party to any act seeking a revision or modification of the terms of the note.

The court erred therefore in dismissing the bill absolutely; wherefore the decree is reversed, and the cause remanded, with instructions to dismiss the bill without prejudice.

T. T. Crittenden, for plaintiff.

CHANCERY.

Graham & co. vs. Noland's Adm'r.

Case 80.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Appeal. Final decree.

April 25.

Judge UNDERWOOD delivered the opinion of the Court.

Statement of the case.

AT the October term, of the Franklin circuit court, 1824, the following decree was rendered in the suit in chancery, in which the plaintiffs in error were complainants, against the defendant Noland. "This day came the parties by their counsel, and submitted this cause to the court for a decree herein, and the court being sufficiently advised in the premises, do order, adjudge and decree, that the injunction awarded the complainants herein, be, and the same is hereby made perpetual, as to the sum of $24, and as to the balance, the same is dissolved with ten per cent damages thereon; and it is further ordered and decreed, that the complainants, pay to the defendant, their costs herein expended, and by consent, the depositions filed in another suit between the parties, are to be filed and read as evidence in this cause, and if the court at the next term of this court, be of opinion, that the complainants are entitled to a further credit, the same may be decreed and credited on the judgment at law; but either party may appeal from the decree then rendered, and on motion of defendant, it is ordered, that no part of this order, is to operate, so as to prevent execution issuing on the judgment at law."

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The only question which we have deemed it important to consider, is, whether said decree, be such an one, that an appeal or writ of error can be prosecuted, to reverse it. If it be final, an appeal or writ of error lies. If it be not final, neither can be prosecuted. It is our opinion, that the decree is not final. It clearly reserves to the circuit court, the power to change the decree at the next term, by allowing the complainants credit, for more than the $24, which were perpetually enjoined. It provides for filing additional evidence, and adds, that either party may appeal from the decree, then to be rendered. It may be said, that these things, are the stipulations of the parties by agreement, and that they should not controul what would otherwise be a final decree. The court has adopted the agreement of the parties in its decree, and having done so, it is clear that the cause was not put beyond the power of the circuit court, that it was not finally disposed of, in all its parts, which were essential to the rights of the parties. We cannot acknowledge, that the parties to a suit, can in its progress, so cut it up, as to authorize two or more appeals. If any doubt would arise upon the face of the decree already copied, it is satisfactorily removed by the additional record filed by agreement, as though it had been brought up by *certiorari*, and which shews, that at a subsequent term, the court made another decree and which, in relation to the costs, is inconsistent with the decree first rendered.

No appeal or writ of error lies, unless the judgment or decree be final.

Being of opinion, that the decree to reverse which, the writ of error is prosecuted, is not final, the suit is dismissed. The defendant in error, must recover his costs.

This decree not final.

Loughborough, for plaintiffs; *Monroe*, for defendant.

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CHANCERY.

Combs vs. Church, &c.

Case 81. Error to the Nelson Circuit; PAUL I. BOOKER, Judge.

Administrator. Security. Counter security. County court. Commissioner. Distributees.

April 27. Judge ROBERTSON delivered the opinion of the Court.

Statement of the case. COMBS and O'Brian having moved the county court of Nelson for counter security, by the administratrix and administrator of Luke Church, for whom they were securities, or for such an order as might relieve them from unnecessary danger, an order was made, directing the goods, chattels and credits of the estate of Luke Church, to be delivered up to the securities for their indemnity. The delivery was accordingly made, and a settlement with the administratrix and administrator was afterwards approved by the court.

Compl'ts bill. Fendal Church, one of the heirs of the intestate, filed this bill against the administratrix, administrator, Combs and O'Brian, and the distributees of the estate.

Decree of the court. The court rendered a decree in favor of each distributee against Combs, and to this decree, various objections are made to this court.

The decree is erroneous. There is no valid objection to that part of the decree which directs several executions to issue. This was right. It conformed to the distinct and several rights of the distributees. But the court has decreed in favor of some who were not parties, and has allowed others of the distributees more than the record will justify.

Distributees made def'ts. their answers cross bills. The distributees who were made defendants, made their answers cross bills. Fielder Cross was one of the distributees. He married one of Luke Church's daughters. The right to distribution would survive to her, if it should remain undisposed of by her husband, in his lifetime. She survived her husband, who died pending the suit. He had answered a bill of interpleader, and admitted a sale of his interest to Haverhill; she was, nevertheless, a necessary party. As there is no evidence in the record that a *subpœna* was served on her, she was not regularly made party, and consequently there ought to have been no decree

The wife of Fielder Cross should have been made one of the parties.

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as to her interest. O'Brian was not noticed in the decree; this was not strictly regular.

Combs' answer, a cross bill.

Combs answered and made his answer a cross bill. Among other things, he charges that a slave which he was charged with selling, was sold by the complainant and the adult distributees and the administratrix, who had received from the purchaser, their respective portions of the price. It was proved that Lynch had received his share, but the others are silent in their answers, as to this allegation by Combs. And there is no proof. The court, however, made Combs responsible, by its decree for $500, for this slave. This was not authorized.

Order of the county court did not constitute Combs and O'Brien, adm'rs. nor had they any power over the estate, but to hold it for their own indemnity; and were responsible for any waste committed on said estate.

The error of considering Combs as an administrator, seems to have been common to all the parties, and the counsel, as well here as in the court below. Whatever might have been the effect of the order by the county court, it certainly did not constitute Combs and O'Brian administrators. It was not so intended. They executed no bond, took no oath. They were only permitted to hold the estate for their own indemnity; and could not become, by such a deposit, administrators. They could do no act as administrators, nevertheless, they should be held responsible by the administrators for the safe custody of the property; and should account for it. Although they had no power to sell the slave, if they did sell him, they should pay the price. There is no evidence that they did sell him; still they should either produce him or show a satisfactory reason for not doing it. As Combs has sworn in his cross bill, that the slave was sold by the administrator and some of the distributees; as they evade a response to this specific allegation; as it is shown that one of them had received his portion, and it is clear that Combs had no legal authority to sell, we are permitted to infer that he should not be made liable to the administratrix and adult heirs for any portion of the price of the slave.

The infant heirs of Luke Church, should have been made parties.

But as it is not alleged that the two infant heirs of L. Church had any agency in the sale, or had received any portion of the price, and as they are not parties to Combs's cross bill, he must be held responsible to them for their interests in the slave. Because, although,

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M'Clanahan's dev'ees vs. Kennedy &c

the administrator and adult heirs are responsible for the portions of the infants, if they did sell the slave, still Combs, as he was made the depository, is also responsible to them, unless he had shown against the infants that the administrator had sold, who had the right to sell. The facts which have been considered sufficient on this point, against the administratrix, &c. cannot affect the infants, as they are not made parties to the contest about the sale.

And as to Cross, the evidence satisfactorily proves that he too, had received his share of the price of the sale.

There ought to have been a decree disposing of the case between the heirs and administratrix and administrator. The decree ought to have either settled their rights or dismissed the bill as to that matter.

The decree reversed.

The decree must be reversed, and the cause remanded with instructions, after the necessary parties shall have been properly brought before the court, to render a decree according to the principles of the former decree modified by this opinion, between the parties to the former decree; and such additional decree, as shall be right between those required to be made parties.

Crittenden, for plaintiff; *Denny*, for defendants.

Chancery.

M'Clanahan's devisees vs. Kennedy and wife.

Case 82

Error to the Bourbon circuit; George Shannon, Judge.

Devise. Devisee. Contribution. Measure of damages. Recovery.

April 28.

Judge Robertson delivered the opinion of the Court.

Statement of facts.

On the 4th day of May, 1807, Thomas M'Clanahan made and published his last will. On the 19th of September, 1808, he annexed a codicil, and in February, 1809, the will and codicil were proved and admitted to record in the county court of Bourbon, where the testator lived and died.

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By this testament, a large estate, real and personal, was distributed specifically, among a large tribe of children and grand children; and among other devises, there is one to Wm. M'Clanahan, of 100 acres of land, and another to Polly M'Clanahan of 50 acres. Eli Kennedy purchased this 100 acres from Wm. M'Clanahan for fifteen dollars per acre, and obtained a deed therefor.

Clauses of the will and codicils, upon which the claim of Kennedy & wife is founded.

The will contains the following instruction to the executor, "to dispose of all my estate, both real and personal, not heretofore disposed of, and the money arising therefrom, to retain in his hands for the purpose *of making good any land that may be lost out of any that* I have bequeathed to my children," &c.

The codicil contains the following declaration: "I do hereby will and appoint the proceeds of said sale of said residue of my estate, as a fund to satisfy the devisees of my said last will and testament, and to be in lieu of any losses of land which have already, or may hereafter happen in any of the lands by my said will devised; and it is hereby expressly declared to be my last will, that said proceeds of said sale by my executor, shall be appropriated by him to the purpose of repairing and making good the loss of certain lands to certain of the devisees in my last will mentioned, out of whose shares respectively, a loss of land has already happened, since the making of my said last will," &c. The codicil then declares, "It is also my will and desire, that if the fund hereby provided, in the hands of my executor, for the purpose of making good to my said devisees any losses in lands, which have already, or may hereafter happen, should at any time prove deficient for that purpose, the balance of losses unsatisfied, shall be made up to the devisees so loosing, by a contribution of all the devisees to my said last will; the said contribution to be made in proportion to the value of the several shares of land devised to them," &c. "And to prevent disputes and difficulties in ascertaining the value of any shares of land in my said will devised to any of my devisees, which shares have already, or may hereafter happen to be lost, I hereby constitute the following as the mode of ascertaining said value: my said executor and those of my said devisees

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who now have, or may hereafter loose any part of the land to them devised, shall each select and choose two disinterested and honest men, with power in said referrees to choose an umpire, and they or a majority of them, with their umpire, shall ascertain the value of the land so lost, and certify the same under their hands and seals," &c. "which value so ascertained shall be paid by my executor accordingly," &c., "and it is hereby further provided that the value of any share so lost, for which contribution is requisite, and the value of such devisee's share, who has to contribute, in order to ascertain the amount of contribution from each, shall be ascertained in the same manner and by the same number of disinterested men and their umpire, chosen by the party who has lost and the party contributing," &c. &c.

Bill of Kennedy and wife

The appellees, Eli Kennedy and his wife, (the devisee of the fifty acres,) filed their bill in chancery, against the devisees and executor, for contribution, for the 100 acres devised to William M'Clanahan, and the 50 acres devised to the appellee, Polly, which tracts they allege had been recovered by Henderson's heirs, in suits prosecuted for that purpose. They charge that the fund in the executors hands had failed; that the executor and the appellees had ascertained, by the award of arbitrators, that the land lost was worth $20 per acre; and that the devisees had refused to contribute or choose arbitrators to adjust the ratio of contribution. They pray a decree for contribution, for the loss of the 50 acres, and also, for that of the 100 acres; claiming as to the latter, to stand, in equity, in the place of the devisee and vendor, W. M'Clanahan.

Answer of defendants.

The devisees, who are very numerous, are all brought before the court; in their answers, some of them admit the loss of the land, and some of them insist that they had lost land, and some that they had contributed to the losses of others; and all of them deny that the appellees ever proposed to them to choose arbitrators, to adjust the values of their lands, and the ratio of contribution. *They all seem to think that the lost land should be estimated as wood land, at the eviction.* Record evidence being furnished of the loss of the 150 acres

Decree of the circuit court, granting relief to the compl'nts.

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of land, and that the successful claimant had recovered rents for the occupancy of the testator, who had lived on a part of the lost land many years; the circuit court determined, in its interlocutory decree, that the appellees were entitled to the value of the 150 acres of land, and gave the appellants leave until the succeeding term of the court, to choose referees according to the will, for adjusting the amount of contribution. The appellants having failed or refused to make the election, the court appointed commissioners to value the 150 acres, and the tracts respectively devised to the appellants. The court being undetermined whether the lands should be valued at the time of the testator's death, or at that of the loss of the 150 acres, directed the commissioners to assess the values at each period. On the return by the commissioners, of a very detailed and elaborate report, the court selected, as the proper criterion for its final decree, the valuations at the date of the loss of the land, and on this basis, made its decree, by which the appellees were allowed the assessed value of the 150 acres when recovered from them, and the amount of profits recovered for the occupancy of the testator.

The main question involved in the consideration of the case is, whether the court selected the proper date for valuing the land. There are, however, subordinate points presented, which will be first noticed.

A deed for land transfers to the assignee, by privity of estate, all antecedent covenants, incident to the freehold, the right of the assignee, is co-extensive with that of the grantor.

It is urged that the appellees had no right to recover from the devisees the value of the 100 acres conveyed to Kennedy by Wm. M'Clanahan. It is true that they had a legal remedy against the heirs of W. M'Clanahan, on the covenant in the deed; and that, therefore, against these heirs alone, (there being full remedy at law,) the chancellor would not entertain jurisdiction. But it is equally true that a deed for land transfers to the assignee, by privity of estate, all the antecedent warrantees, covenants and pledges incident to the freehold. The will of Thos. M'Clanahan guarantied indemnity to the devisees of his lands. His whole estate was pledged for the security of every part. Wm. M'Clanahan, therefore, had a perfect right in equity, to contribution from the other devisees, for the value of the 100 acres devised to him. By conveying it to

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Kennedy, that equity passed to him. And for this reason and to prevent circuity and multiplicity of suits, he had the right, by making all the devisees defendants, to call on them in chancery for contribution "*pro rata*," to him, instead of Wm. M'Clanahan. But he has no right, certainly, in this way to recover more than Wm. M'Clanahan would be entitled to recover, that is, the value of the land. If he paid to M'Clanahan more than the assessed value, the overplus he can demand from M'Clanahan's heirs alone.

A devise of land, by the parcel, the devisee entitled to any surplus; and if lost, to contribution from other devisees the will having charged all the estate, devised with such losses.

There was a surplus in the tract lost by Kennedy and wife, and there are surpluses in some of the tracts of other devisees. The whole quantity of each tract was assessed, and to this the appellants object. We are unable to feel the force of this objection. Each devisee was entitled to all the land included in the boundary of the tract devised to him. If there were surplus, it was his; if there were any deficit, he must sustain the loss. The entire tract, whether more or less than the estimated quantity, belonged to the devisee. For whatever quantity he lost, he had a right to indemnity, and the other devisees were bound to contribute according to the actual value of the devises to them respectively. The one had a right to demand and the other was bound to pay, in proportion to the actual value of the property devised to each. This value would be augmented by a surplus, and diminished by a deficit.

When the will points out a mode, by which values are to be assessed, and contributions made, among devisees, and there are infants, bill in chancery is the proper remedy for failure to comply.

It is also objected, that a suit in chancery, should not be sustained, as the will appointed another mode of settlement. This objection is more specious than solid. Waiving other answers that might be made to it, there is one, which alone ought to be satisfactory. There is a multitude of persons interested in the questions to be disposed of in this case: and some of them are infants. It would be therefore very difficult, if not impossible, to make a valid settlement, between such parties, without a decree by the chancellor. And the plaintiffs in error, cannot complain, that the defendants, have called on the chancellor, to compel a submission to the arbitration of persons to be chosen according to the directions of the will. The court decreed such election, and reference; and the plain-

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tiffs in error, have forborne to make any effort for an adjustment, in such a mode. It is not probable that they would have done it without a suit. The defendants allege, that they had refused to select arbitrators before the bill was filed; and subsequent events corroborate that allegation. How then is the right of the defendants, and the liability of the plaintiffs in error to be ascertained and enforced? By a suit in chancery alone. This is compulsory, and will bind all parties, infants and adults. Without it, they would not act, and their acts might not be valid, if they had chosen to submit to arbitration.

Rents recovered from the devisee for the occupancy of the testator, are to be compensated by the same mode of contribution established as to lost land. It was a debt due by testator, and a charge upon his whole estate.

The plaintiffs in error, are not satisfied with the allowance to the defendants of the amount paid for the occupancy by the testator. They are surely entitled to this, if they have right to any thing. They had a right to the 150 acres of land, unincumbered. The rents due for the use of the land, by the testator, were a charge on all the devisees. Any one who paid this debt, had a right to demand contribution of all the others. The will intended to secure to each devisee, the entire value of the property devised to him. If unexpectedly, the thing devised to any one, should be incumbered, the whole estate of the testator, was responsible for its extrication. Otherwise, the obvious intention of the will, might be frustrated. If the 150 acres had been sold for the debt of the testator, it could not be doubted, that his estate stood pledged for the indemnity of the defendants. Their claim to be re-imbursed for payments made for rents due, by the testator, is equally as clear, and as strong. And it seems to us, that it is as indisputable, as their right to contribution, for the loss of the land, by a paramount title. But the principal objection to the decree, as already stated, is, that it has allowed to the defendants the value of the land at the time of loosing it. The plaintiffs in error, insist that the defendants are entitled only to what the land was worth, at the death of the testator, and that the devisees who are bound to contribute, should do so according to the value of their legacies estimated at the same time. In this they are right. The value of the land, at the time the devise of it took effect, is, what is "*to be made good*" to the

The value of the land when devise took

M'CLANAHAN'S DEV'ES vs. KENNEDY &c

effect; the measure of the recovery of the devisee, upon the loss of the land, and the amount to be made up by contribution.

devisee. This was what was given, and what must be secured. A devises to B, 100 acres of land, and to C, 200, when the titles vest by the will, the 100 acres, are worth $1000, and the 200 acres, are worth $2000. Then $1000, is given to A, and $2000, to C. The will directs, that, if either shall loose his land, it shall be made good to him by contribution from all the devisees, there being many others. B looses his 100 acres, twenty years after the death of the testator; at the time of eviction, it is worth $50 per acre. The land of C, is still worth no more than $10 an acre, consequently, the devise to B, has increased from $1000 to $5000, in value, whilst that to C of $2000, has remained stationary, at $2000. Now what shall C contribute, as his rateable proportion, for B's indemnity, or in other words, to make B's land good to him? Surely not more than his distributive part of the $1000, devised to B, and which he has lost. If he shall be compelled to pay his distributive part of $5000, he will be impoverished, and B enriched; and his $2000 devise, will be reduced to perhaps $500, to magnify the $1000 devise to $5000. This cannot be just. It never was in the contemplation of the testator.

Suppose the devise be of slaves. The father devises to his son John, a grown man slave, worth $500, and to his son James, an infant female worth only $100; he directs, that if any of his devisees, shall loose the thing devised, by the assertion of a better title than his, all the other devisees shall make the loss "*good to him.*" Thirty years after the testator's death, (such a thing can happen) James looses his slave, and several children which she has borne. They are worth $2000. By what standard of value shall John's contribution be regulated? Certainly not by the $2000. Many other cases might be supposed for illustration. If the testator had even sold and warranted the land, (which he devised) his heirs or devisees would be responsible, only for the value at the date of the conveyance. Besides, the codicil shews clearly, that the value at the time of the testator's death, should be the criterion of contribution. Some of the land, devised by the will, had been lost before the codicil was executed. And therefore, the devises of lands, which had been or might thereafter be lost,

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are required to be made good. How are those which had been lost before the testator's death, to be made good? Certainly, by paying their value at the time the will took effect, and not any prospective value. The same rule should be applied to every case. It is immaterial when the land may have been lost, or when the suit may have been brought for contribution, the rate of contribution, is to be ascertained by the value of the land, as well of the contributors, as of the looser, at the time the titles vested by the will. This construction, accords with the letter and the intention of the will, and with all the analogies of the law. And any other construction, might not only lead to manifest injustice, and inequality, but to an entire frustration of the testator's will. This rule is unexceptionable. It secures to each, as much as was given to him, and exacts contributions, in proportion to what was received. It will place the devisees, as was intended, in "*statu quo*," that is, where the testator left them, and the will found them, and where the testator chose to fix them. He intended that the value of what he gave, should be preserved to the donee. But he never could have wished, that his estate and his devisees, should be bound for more than he gave, which would be the case, if any adventitious accession of value must be a burthen on his estate. It is not necessary to pursue this subject further. The value of the 150 acres, as they stood, when the testator died, whether improved or unimproved, belonged to the devisees of the two tracts. The defendants in error should not be charged with improvements made by the testator, they passed with the land, and constituted a portion of its value.

If rent has been paid by the devisee losing land under this will, the value of the land at testator's death, and interest from that time, added to the rent paid for the occupancy by the tes-

If the defendants have been compelled to pay to the successful claimant rents for *their* use of the land lost, or for its occupancy by William M'Clanahan, (as the devisees, have enjoyed the use and value of the lands devised to them) they should have interest on the value of the land. In this event, the value of the lost land, at the death of the testator, and legal interest thereon, from that time, together with the amount paid for the occupancy, by the testator, will constitute the aggregate claim of the defendants for indemnity, by the contribution of such of the other devisees, as shall be found to be responsible.

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All who may be infants in the case, should appear by guardians *ad litem*. As to any ulterior question which might arise between the defendants, and William M'Clanahan's heirs, under the deed of their father, we have nothing to say. No such question has been raised in this case.

later, the aggregate claim for indemnity and the sum to be contributed.

The remedy against the heirs, if it should ever be necessary and allowable to assert it, is purely legal.

Decree reversed.

The decree is reversed, and the cause remanded, with instructions to render such decree, on a proper presentation of the case as shall be just and equitable, making the principles of this opinion, so far as they shall be applicable, the basis of the reformed decree.

Crittenden, for plaintiffs; *Talbot*, for defendants.

COVENANT.

Sthreshly vs. Broadwell.

Case 83.

Appeal from the Fayette Circuit; JESSE BLEDSOE, Judge.

Submission. Award.

April 28.

Judge UNDERWOOD, delivered the opinion of the Court.

If award do not conform to submission, it is a nullity.

THIS was an action of covenant brought in the circuit court, by Broadwell, to recover of Sthreshly, upon a warranty of the soundness of a negro woman and child, sold by the latter to the former. The defendant plead an award in bar of the whole action. The plea was demurred to, and the court sustained the demurrer, and this constitutes one error assigned. We think the plea bad. The award related exclusively to the child, the articles of submission related exclusively to the woman, who was dead before the articles were entered into. The award was, therefore, altogether unauthorized and constituted no bar to the action. The plea made profert of the articles of submission, and the award, oyer of both, was craved by the demurrer, and although it does not appear that they were spread on the record, *in hæc verba*, yet we think it is manifest they were before the court and were properly considered in deciding on the validity of the plea. The matter of the award, if good, is not sufficiently pleaded.

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The only remaining question relates to the refusal of the court to grant a new trial. The evidence is such that the court ought not to have controled the jury had they found either way. The new trial was properly refused.

Judgment affirmed with costs and damages.

Crittenden and *Denny*, for appellants; *Haggin* and *Loughborough*, for appellee.

Hopkins vs. Stephenson.

CHANCERY.

Error to the Nicholas Circuit; JOHN TRIMBLE, Judge. Case 84.

Mortgage. Conditional sale. Equity of redemption.

Judge UNDERWOOD delivered the opinion of the Court. April 28.

STEPHENSON filed his bill for the purpose of compelling Hopkins to convey to him the legal title to fifty acres of land, which Hopkins had acquired from John Fowler, in virtue of a bond for the title on Fowler, assigned by Stephenson, the obligee, to Hopkins. On the day the assignment was made, to-wit: 29th April, 1811, Hopkins executed a bond to Stephenson in the penalty of $500, with the following condition: Stephenson's assignment of Fowler's bond to Hopkins.

"Whereas George Stephenson hath this day assigned to John Hopkins, for value received, a certain bond on John Fowler, for two tracts of land on Taylors creek, one containing seventy-five acres, the other fifty acres, be it understood, that if the said Stephenson shall, against the 25th of December next, pay, by himself or his order, to the said Hopkins, $23, also pay all moneys which the said Hopkins shall pay to John Fowler for the said Stephenson, all which payment is to be made to the said Hopkins at the same time; the condition of the above obligation is such, that the said Hopkins is bound in the above penalty to reassign to the said Stephenson, the said bond which he has received of said Stephenson on John Fowler, or deliver him bond or bonds on John Fowler, including the same land; if this condition is complied with by said Hopkins, the above obligation to be void, otherwise to remain in full force and virtue in law." Fowler's bond to Stephen- Condition of Hopkins's bond to Stephenson.

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HOPKINS vs. STEPHENSON.

son bears date the 29th September, 1810, and stipulates, in consideration of $262 50 cents, to be paid him, and a relinquishment to be made to him by Stephenson of all his recourse on Michael Cassidy, who sold the same lands to Stephenson, that a conveyance with general warranty shall be made, on request, after the money is paid and relinquishment executed by Stephenson. Fowler's bond describes the two tracts of land. It fixes no time when the money is to be paid or the relinquishment to be executed.

Endorsement on Fowler's bond.

On the bond of Fowler is this endorsement, "26th June, 1811, I have this day received of John Fowler his obligation to convey to me fifty acres of the within described land, it being George Stephenson's improvement. (Signed) JOHN HOPKINS."

Whether a mortgage or a conditional sale, depends upon the facts attendant upon each case. The intention of the parties to be collected from circumstances. If Hopkins had paid the whole sum due Fowler, it would have been evidence of conditional sale; not having done so, he treated the transaction as a mortgage

Stephenson insists that the transaction was in the nature and character of a mortgage, and by it no more was intended than to secure Hopkins the payment of the $23, and such sums as he might pay Fowler. Hopkins insists that it was a conditional sale, and that he should not now be disturbed in the legal title. We are to decide between them. To distinguish between a mortgage and a conditional sale, is often a perplexing question. In Prince vs. Bearden, 1 Marshall, 170, it is said that "each case must in some measure depend on its own circumstances, and rest upon the legal discretion of the court. See also Burn, title, Mortgage, letter B. The difficulties in the present case have been greatly increased by the awkwardness and want of skill manifested in drawing the obligation from Hopkins to Stephenson. That paper leaves many things for conjecture. It does not appear that Hopkins was to have interest on the $23 advanced, nor is it stipulated that he shall have interest on the money which he may pay to Fowler. Hopkins takes no obligation on Stephenson by which he could coerce from him the payment of the money on the 25th December next, after the date of Hopkins' bond to Stephenson. It would seem from the papers, that it was entirely at the option of Stephenson whether to pay the money or not, and that his right to demand a re-assignment of Fowler's bond, depended on paying to Hopkins, by the 25th of December, the amount of money Hopkins had

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before that time advanced to Fowler, and the $23 in addition. This would be a literal construction, and if adopted by the court, would result in declaring the transaction a conditional sale. But its operation might have an effect so injurious to the interests of Stephenson, that it is very difficult to say that the parties ever intended that their contract should receive that construction. Hopkins was not bound to make payment to Fowler; he was at liberty to do so if he choose; but the inference is forcible that there was a verbal understanding that he should do it. If he made no payment to Fowler, it cannot be believed that he was to have both tracts of land for $23, if Stephenson failed to repay it at the day. That the parties intended such a thing on that event, cannot be credited. The debt to Fowler amounted to $262 50 cents; it is not stipulated how much of it Hopkins contemplated paying, nor does it appear at what time or times the $262 50 became due. By an admission of the parties, filed as evidence, it appears that $150, the price of the fifty acres of land on which Stephenson lived, was due to Fowler on the 15th of May, 1811, and that Hopkins paid it, but it does not appear that Hopkins ever paid Fowler the remainder of the $262 50; nor is the tract of seventy-five acres in any way involved by the pleadings in this cause. Whether Hopkins claims it or Fowler has been paid for it, we know not. Stephenson and Hopkins contracted with Fowler's title bond before them. Under the idea that Hopkins was making a conditional purchase of the whole land, or the whole interest in Fowler's bond, which was assigned to him without limitation, we think it must be intended that he was to pay Fowler the whole of the purchase money due for the land, and that the $23 paid Stephenson, was so much given him for his bargain; and if it had appeared that Hopkins had gone on and paid Fowler fully, we should have been disposed to consider the transaction a conditional sale; but as he only paid a part, we think he treated the contract as though the bond was assigned to him merely as a security. We cannot imagine that Hopkins was to get all the land by paying for a part. If then, he was not to get all, what part of the land was he to have, for that part of the purchase money which he might

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HOPKINS vs. STEPHENSON.

pay, conceding for argument that he was to be compensated in land? The contract is wholly silent, and it is perfectly arbitrary to say that he might pay $150 and claim the fifty acres, or pay $112 50 cents and claim the seventy-five acres absolutely. We cannot make contracts for parties, we can only expound those which they have made, and enforce their intentions, if to be collected from the written evidences. Viewing the whole case, as presented by the written contracts, we regard the assignment of Fowler's bond to Hopkins, as a security for any partial payments made to Fowler.

If mortgagor has received advances from mortgagee, to the value of thing mortgaged, at the date of mortgage, & has delayed to redeem an unreasonable length of time the chancellor will not interpose, to enable him to redeem, against mortgagee in possession, to the injury or prejudice of mortgagee.

Believing, therefore, that Stephenson had the right to redeem, the next question turns on the nature of his right of redemption. Is it such that it may be asserted and enforced at all times, or is it such that a chancellor may, under some circumstances, refuse to allow and enforce it? And do any such circumstances exist to justify such refusal in this case? At common law, when the mortgagor failed to comply with the conditions of the mortgage, the estate was absolutely forfeited to the mortgagee. The equity of redemption was an invention of the courts of chancery, to mitigate the hardships of an absolute forfeiture upon a trifling consideration. Mortgages are, in the general, nothing more than securities for the loan of money, and the thing mortgaged so often exceeded, in value, double the debt, that courts of equity interposed where payment was not made on the day, to prevent the loss which the mortgagor would sustain if his property was taken for half its value; and thus an equity of redemption was attached to mortgages. If the money lent, had uniformly equalled the full value of the thing mortgaged, the doctrines of the law in relation to equities of redemption, would, in all probability, never had an existence. And now, where the mortgagor makes application to the chancellor to redeem, we have no doubt he ought not to be permitted to do so, if it can be shown that he received advances to the value of the thing mortgaged, and that by his delay an unreasonable length of time, or by any other conduct of his, he would inflict injury unjustly on the mortgagee. The proof in this cause does, in our opinion, make out such a case as would authorize and require the chan-

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cellor to refuse his aid to Stephenson. It is satisfactorily established, that the money paid Stephenson, and that paid Fowler by Hopkins, was a fair price for the fifty acres of land at the date of the contract; that lands of equal quality, and with improvements not much inferior, in the same neighborhood, were sold at much less per acre. It is shown that Hopkins was in possession eight or nine years before Stephenson filed his bill to redeem, and that Hopkins had improved the land and rendered it more valuable by his labor. It is proved by the subscribing witness, to the bond executed by Hopkins to Stephenson, that it was the intention of the parties, at the time, to make a conditional sale of the fifty acres, and not a mortgage; that Hopkins refused to pay Fowler for the seventy-five acres, or to have any thing to do with that, and that he took an assignment of Fowler's bond, with a view to get Fowler to separate the seventy-five and fifty acres, and to secure the fifty acres to Hopkins; and that if Fowler would not do so, then Hopkins would have nothing to do with the land, but was to have a colt, then delivered to him by Stephenson, for the $23, and which colt was returned to Stephenson after Fowler had secured the fifty acres to Hopkins. It is true, that this testimony of the subscribing witness would show, that the parties were unfortunate in conveying their meaning, by the manner in which their contract was reduced to writing; and could not be received to vary the effect and legal operation of the writings, where there has been no allegation of fraud or mistake; but we conceive it may be properly admitted, to rebut the equity attempted to be set up, and to show, that Hopkins was a *bona fide* holder, in his own right, and not as mere mortgagee, receiving the profits in discharge of his debt. It is also shown, that after the time Stephenson, by contract, was bound to pay Hopkins, the latter offered to take his money and give up the land; which proposition was not then acceded to by Stephenson, who offered to do it at a subsequent time, when the land had risen in value. Under these circumstances, we are of opinion, that Hopkins, holding the legal title and in possession, ought not to be disturbed, and that Stephenson's equity was not such as to justify the interposition of the chancellor.

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ELLIS vs. GOSNEY'S H'S

It is erroneous to permit a party, in whose favor conveyance of legal title has been decreed, upon payment of money, to *withdraw* the sum deposited in court, unless the decree be changed as to the conveyance.

The record shows that after the circuit court had decreed a conveyance, from Hopkins and his *pendente lite* vendee, to Stephenson, upon his paying Hopkins $164, the balance due, after settling an account taken for rents and improvements, that Stephenson brought the said $164 into court and deposited it with the clerk for Hopkins, as required by the court. At a subsequent period, by order of the court, Stephenson was permitted to withdraw the money so deposited. This was clearly erroneous. As the record now stands, Stephenson has the money and also a decree for the land. He cannot have both, and having come into court and taken the money again, it furnishes another reason why he should not have the land. We would also remark, that the decree of the circuit court is erroneous in regard to the settlement of the accounts for rents and improvements; Hopkins is allowed pay for the improvements made by him, and he is charged rent upon ground cleared by his own labor. This is wrong. A mortgagee in possession is chargable with the profits of the estate as he received it, and he is to be allowed, out of the profits, for necessary repairs; but he cannot make the mortgagor his debtor, by putting improvements on the land, nor should the mortgagor be allowed to raise an account for the profits of such additional improvements. See Moore vs. Cable, 1 Johnson's Chan. Repts. 387.

The decree of the circuit court is reversed, with directions to that court to dismiss the complainant's bill. The appellants must recover costs.

Denny and *Mills*, for the plaintiff.

CHANCERY.

Ellis vs. Gosney's heirs.

Case 85.

Appeal from the Fayette Circuit; JESSE BLEDSOE, Judge.

Administration. Bill of sale. Warranty. Slave. Heirs. Devisees. Injunction. Bill in chancery. Remedy.

April 29.

Judge ROBERTSON, delivered the opinion of the Court.

Statement of facts.

ELIZABETH GOSNEY, administered on the estate of her deceased husband. A slave named Tom, was, among other things assigned to her for her dower.

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Tom, having afterwards fled from the state, and taken refuge among the Indians, she employed William Ellis, to pursue and reclaim him if possible, and agreed, that if he should succeed, in restoring to her, Tom, she would sell him to him, for £100. ELLIS vs. GOSNEY'S H'S

Having found Tom, on the northwestern frontier and brought him back to Kentucky, some misunderstanding arose between Ellis, and Mrs. Gosney, which they submitted to arbitration. The following is the result of this reference. Submission.

"We the subscribers, being called on by William Ellis and Elizabeth Gosney, to settle a matter in controversy between them, respecting a negro man Tom, which run away from the said Gosney, which William Ellis followed to the Indian nation, and brought the said negro man, Tom, back, and we are of opinion, that Elizabeth Gosney conveyed the said negro, agreeably to the annexed bill of sale, and that William Ellis pay up to E. Gosney, fifty pounds, in the year 1802, and fifty pounds within the year 1803, or pay up to the said William Ellis, for his trouble for bringing in said negro, eighty dollars, and if E. Gosney chooses to pay the money, William Ellis, is to hold the negro till he is paid. Given under our hands and seals, this 11th November, 1802. Award of arbitrators.

"H. HARRISON.
H. TAYLOR.
LEO. YOUNG."

The following bill of sale, was executed in conformity to the award. "I do hereby certify, that I have sold to William Ellis, a negro man, Tom, for the consideration of one hundred pounds, the title of which negro, I warrant and forever defend. Given under my hand and seal, this 11th day of November 1802. Bill of sale from adm'x. to Ellis.

"ELIZABETH GOSNEY. SEAL.

"Teste.

"JAS. TRUE, ROBT. COLLINS."

In 1815, Mrs. Gosney died. Her children as heirs of her deceased husband, shortly after her death, brought an action of detinue for Tom, against Ellis. The suit being submitted to arbitration, the award was in favor of the plaintiffs, and judgment was accordingly rendered for them.

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ELLIS vs. GOSNEY'S H'S

To enjoin this judgment, and to obtain general relief, Ellis filed a bill in chancery, (the foundation of this suit,) against the said heirs and successful plaintiffs, in he action of detinue. The bill charges, that the sale of Tom to him, was made by Mrs. Gosney in her character of administratrix, That the heirs had acquired, by descent or devise from her estate, sufficient to indemnify him, which he says they are bound by their mother's warranty to do, if they hold the negro.

Ellis's bill in chancery, with injunction.

The answers of the heirs, insist on the award and judgment upon it, as a bar to any further litigation about the title of Tom; aver that their mother only sold to Ellis her life estate, and deny that they had any estate from her; but in other answers extorted from them by the court, some of them admit, that they held some property by the will of their mother.

Answer of def'ts.

The court dissolved the injunction, and dismissed the bill. From which Ellis appealed.

There can be no objection to the dissolution. For whatever other right Ellis might have had, he had none to an injunction. He could not set aside the award and judgment in the action at law, by his bill in chancery. He did not seek to do so. Nor could he escape the effect of the judgment by disputing the right of the heirs to Tom. If he has any right, it is on the warranty. And he has made no allegation of insolvency or other fact, which would authorize an injunction, and a set off of the damages, for breach of warranty. Therefore, the injunction was properly dissolved.

When remedy at law, injunction not to be granted, except under particular circumstances.

But the bill was improperly dismissed. Mrs. Gosney warranted the whole title. While Tom was a fugitive, it was doubtful whether he would ever be found. She agreed to sell him to Ellis for £100 if he would find him: she did sell him accordingly. The price given is proved to be a generous price, for the entire right to Tom. And we can give no other construction to the bill of sale, than that it is a sale and warranty of the whole title to Tom.

Construction of the bill of sale.

There is some diversity in the parol evidence on this subject. But even if there had been no bill of

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sale, the facts proved by the witnesses, would be scarcely sufficient to justify the opinion, that the warranty extended no further than the life estate. LEACH vs. GENTRY.

There was no personal representative of Mrs. Gosney. Her heirs or devisees are responsible for her undertakings and liabilities, to the extent of the property acquired dy descent or will from her. The heirs were not expressly bound by the covenant of warranty. They could only be sued with the personal representative, in an action at law. It was therefore proper for Ellis to sue in chancery. Besides, for claims against heirs and Devisees, in that character, a suit in chancery, is an appropriate remedy, although there may also be a legal remedy. Cox's heirs vs. Strode, 2 Bibb, 273. When no personal representative, bill in chancery the appropriate remedy, to compel heirs or devisees to answer, to the extent of devised estate, for breach of covenant of the ancestor or testator.

Ellis was therefore entitled to a decree against the devisees for something. And the court ought to have ascertained the extent of the liability of the devisees, and so far, have given to Ellis relief.

Wherefore the decree is reversed, and the cause remanded, wih instructions to the court, to asertain by inquisition, the amount devised by Mrs. Gosney to the appellees respectively, and according to the several values so ascertained, to decree to Ellis on the warranty of title.

Wickliffe and *Triplett*, for appellant; *Payne*, for appellee.

Leach vs. Gentry.

CHANCERY.

Error to the Bullitt Circuit; PAUL I. BOOKER, Judge. Case 86.

Agreement between parties. Puis darien continuance. Amended bill. Allegation. Evidence. Consent. Decree.

Judge UNDERWOOD delivered the opinion of the Court. April 29.

LEACH having obtained a judgment against Gentry, in an action of covenant for failing to convey a tract of land, as required by Gentry's obligation, the latter filed his bill against the former, to enjoin the judgment, and to have a specific execution of the contract. The bill avers that Gentry then had Statements of compl'nt's bill.

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LEACH vs. GENTRY.

title, and was ready and willing to to convey; that Leach had been put into possession; that he had quietly enjoyed the use of the land, and that he had sustained no injury. The prayer of the bill was, that Leach might be compelled to accept a title, and if not, that he might be compelled to account for rents and profits.

Leach's answer.

Leach answered, denying that Gentry had title, and resisted a specific execution, upon the ground that he had been much injured, by failing to get a title when he ought to have had it, whereby, he lost an opportunity of selling to advantage. To balance the claim for profits, Leach sets up a claim for improvements. In this attitude of the parties, in respect to their pleadings, and the matter set forth in their bill and answer, they proceeded to take many depositions.

Agreement to rel ind, signed by Leach and Gentry.

About one year after the filing of the bill, the parties entered into the following agreement: "Gentry vs. Leach, in Ch'y. This suit is to be dismissed at the cost of John Gentry, except the defendant's attorney fee. The judgment of the law, which is enjoined is satisfied. Leach's bond to Gentry, is also satisfied, and to be withdrawn by leave of the court, and the whole transaction is rescinded. Feb. 16, 1826.

his
ENOCH ⋈ LEACH. SEAL.
mark
JOHN GENTRY.

Witness, THO. Q. WILSON.

At a court subsequent to the date of the agreement aforesaid, the court by its decree, carried the agreement into effect, by disposing of the suit, according to its stipulations, and the defendant Leach, thereupon prayed an appeal to this court.

That which is not put in issue by the pleadings, can not be considered, tho' proved. The party in chancery

There is nothing in the record, which shews that Leach assented to the decree. It is clear that he did not from the circumstance of his praying an appeal immediately. Were the court right in enforcing the agreement between the parties, relative to the disposition to be made of the suit, when such agreement was not relied on, or put in issue by the pleadings of either party? Under such circumstances, a decree in

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conformity to the agreement, cannot be sustained, when, otherwise, it is against the obvious equity of the case. In this instance the agreement was brought before the court as evidence, by depositions. No proposition is better supported by authority, than that which declares evidence, without appropriate allegations to admit it, unavailing. It is a rule founded on reason, conducing to secure the rights of parties, and should be adhered to. According to the agreement, Leach acknowledges satisfaction of the judgment enjoined, this is no where relied on in the bill. If Leach would not come forward, and in open court, consent to have such satisfaction entered of record, then Gentry, by an amendment to his bill, should have brought that matter before the court as a transaction *puis darien continuance*, and thus give Leach, an opportunity to plead and answer; that it was not his deed or that it was procured by fraud, or without consideration, or that the consideration had failed, or to set up against it, any other defence which would shew, that it ought not to be enforced. As these are rights which Leach has been deprived of, by a specific enforcement of the agreement, when it was not in any way relied on by the allegations of Gentry, the court erred in rendering the decree. It is not shewn by Gentry that he had title to the land sold to Leach, and but for the agreement, there is no question, but that his injunction should have been dissolved.

wishing to take advantage of an agreement made, *pendente lite*, must bring it before the court, by amendment, as matter occurring *puis darien continuance*; otherwise it is error to make such agreement the basis of a decree, unless consent given in open court.

The decree of the circuit court must, therefore, be reversed with directions to that court, to give Gentry leave to amend his bill, by bringing the new matter, growing out of the agreement, before the court, within a reasonable time, to be fixed by the Court, and on his failure so to amend his bill, then to proceed and decide the cause, disregarding the agreement between the parties. The plaintiff in error must recover costs.

Decree reversed.

T. T. Crittenden and *Chapeze*, for plaintiff; *Rudd* for defendant.

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Commonwealth vs. Edwards.

Case 87. Error to the Jefferson Circuit; HENRY PIRTLE, Judge.

Mayor of Louisville. Justices. Jurisdiction. Recognizance. Criminal prosecutions. Circuit Court. Statutes.

April 29. Judge UNDERWOOD, delivered the opinion of the Court.

Def't. accused before the mayor of Louisville, for keeping faro table; he is recognized by the mayor, to appear before him at a future day. Ruled, the recognizance a nullity. The jurisdiction of the mayor same with that of two justices. Neither has power to recognize to appear, unless before the circuit court. Power limited to inquiry, committal or discharge, of recognizance to circ't court, circuit court no jurisdiction over a recognizance not returnable to their clerk's office, by law. Court of appeals can take no jurisdiction.

HADEN EDWARDS was apprehended and brought before the mayor of the city of Louisville, to answer a charge for setting up and keeping a faro table, contrary to the statute. The parties not being ready for trial, the mayor admitted Edwards to bail and took his recognizance, with T. G. Johnson as surety, *to appear in the mayor's court on the ensuing Saturday, for trial.* Edwards did not appear, and the mayor returned the recognizance to the clerk's office of the circuit court, for Jefferson county. The circuit court, at their May term, 1828, ordered that said recognizance be quashed, and added, that "the defendant be, from this prosecution, and he is hereby discharged, and may go hence thereof, without day." Edwards was not in court when the order was made. The commonwealth has brought the case to this court for reversal, and has assigned for error the quashal of the recognizance and the discharge of Edwards. The recognizance and all the proceedings had in relation to it, are nullities in law. In the first place, the mayor had no right to take such a recognizance. His authority in relation to criminals, is the same as that vested by law in two justices. See sixth section of the act of 1828, incorporating the city of Louisville. These are authorized to inquire into the truth of criminal charges, and to commit the accused or to take a recognizance in bailable cases, for the appearance of the accused before the circuit court, on the first day of the next succeeding term. 1 Dig. 405. No power is given to take recognizances for the appearance of the accused, before the justices at a distant day, for trial. The whole tenor of the act indicates that it is the duty of the justices to make the inquiry without such delay, and the practice is, to hold the accused in custody, should it be necessary, from unavoidable causes, to delay a day or more. Justices have no authority to enforce recognizances when violated. Circuit courts

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have no authority to enforce any recognizances except those taken by them, or such as are returned to them by the express provisions of law. We have found no law which allows circuit courts to take jurisdiction of recognizances taken for the appearance of the accused before the justices. The mayor had no authority and the recognizance taken by him, in this instance, is void. The clerk of the circuit court had nothing to do with it, as it was not such a recognizance as the law required should be returned to his office, and the circuit court had just as little to do with it as the clerk. The order quashing it, is wholly inoperative, because it was a nullity without it, and the court had no jurisdiction. The balance of the order purporting to discharge and acquit Edwards from a crime, when he was not in court, when he had not been indicted, is equally without authority, and void upon its face, and cannot have the effect supposed in argument, to bar other proceedings against him. The whole case is one in which the circuit court acted without authority, and cannot, therefore, by such an action, give this court jurisdiction; See Beasley vs. Simms, 4 Bibb, 268. Wherefore, the writ of error is dismissed.

Denny, Attorney General, for commonwealth; *Crittenden*, for defendants.

Parker et als. vs. Marshall.

CHANCERY.

Error to the Mason Circuit; ADAM BEATTY, Judge. Case 88.

Entry. Survey. Locative calls.

Judge ROBERTSON, delivered the opinion of the Court. April 30.

Younger patentee claiming elder entry, filed his bill in chancery, against the elder patentee, for a conveyance of the legal title. Two springs shewn which at the

ALEXANDER K. MARSHALL brought his suit in chancery against the plaintiffs in error, on the following entry, on which he had obtained a patent: "June 16th, 1780, Col. Thomas Marshall enters 10,500 acres of land upon T. Wts. to begin at the end of two and a half miles east of Wm. May's spring, where the said May's settlement and pre-emption is located, then to run north, twenty-two degrees east, 1280 poles, and to extend from each end of said line, eastwardly, for quantity."

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PARKER ET. ALS. vs. MARSHALL.

date of the entry, were notorious, by the appellation and description used in the entry. Ruled, that the entry was valid to the extent of the land, common to two surveys, made at the distance called for, from each spring, and that so far as the elder patent interfered with the land, thus common, to two surveys; the complainant had a right to conveyance of the legal title.

The survey was made accurately, and the notoriety of the locative objects is clearly proved. But the evidence shows, that at the date of the entry, there were two springs, either of which would correspond with the call for May's spring; and the proof in relation to each is nearly equiponderant. However, adopting either spring as the one intended by the entry, the boundary of two surveys would include a great deal of land common to both, and leave out very little, comparatively.

The entry being older than that under which the plaintiffs in error claim, the court decreed a conveyance to the defendant in error, by the plaintiffs in error, of their legal right to all the land embraced in their patent, which would be covered equally by surveys of Marshall's entry, beginning two and a half miles east from each spring.

The principle of this decree is arraigned by the plaintiffs in error. They insist that the uncertainty resulting from the existence of two objects so exactly corresponding with the call for May's spring, renders the entry void. This would be true, if the two springs were so remote from each other, that surveys made to answer the call for either, would include no land common to each. For then the call for one spring, (there being two, either of which would equally correspond with the call,) would be delusive to a subsequent locator. But this reason fails in this case. The springs are so near to each other that a survey of 10,500 acres beginning (not at the spring) but two and a half miles from either spring, must necessarily include the same land, to a considerable extent. So far as surveys beginning two and a half miles from each spring, would include the same land, there could be no uncertainty, which could deceive a subsequent appropriator, any more than if there had been but one spring. He would go to May's Lick, (for this is within May's settlement and pre-emption,) and if he should find two springs, and not be able to ascertain which was called for by Marshall, he would measure two and a half miles east from each, and finding that surveys from either point would include most of the same land, he would know that to the extent of the common area, the land was

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appropriated, whether the one or the other was the spring designated by Marshall's entry. And if he were a just or a prudent man, he would forbear to interfere. A vigilant man could not interfere, ignorantly. The course, the distance, the quantity of the entry, would all be such infallible clues as to leave him no apology for mistake or delusion. So far, therefore, as the two surveys would embrace the same land, there can be no uncertainty which could render the entry void; and this point has been established by repeated adjudications of this court. See Morgan vs. Robinson, Pr. Dec. 269; Craig vs. Rogers, Hardin 138; M'Crackin's heirs vs. Steele, 1 Bibb, 51; Smith vs. Harrow, Ib. 102; Marshall vs. Rough's heirs, 2 Bibb, 631.

There is no error in the decree, therefore it is affirmed.

Brown and *Reid*, for plaintiff; *Crittenden* and *J. J. Marshall*, for defendants.

Todd and Lindsey vs. M'Clanahan's heirs.

WRIT OF ERROR.

Error to the Bourbon Circuit; GEORGE SHANNON, Judge. Case 89

Execution. Quashal. Correction. Writ of error.

Judge ROBERTSON, delivered the opinion of the Court. April 30.

JOHN TODD and William Lindsey, sued out a writ of error *coram vobis*, to quash a *fieri facias* which had issued against them, in favor of the heirs of Thomas M'Clanahan deceased, for $2,698 23 cents.

The plaintiffs in error, prosecuted a writ of error, to revise a judgment in their favor, quashing an execution, sought to be quashed upon writ of error, *coram vobis*, because the court below, did not quash upon different grounds from those assumed.

Four errors were assigned. The court quashed the execution; and in its opinion, stated that the first error assigned, (which was, that the execution issued for two much) was the only one which was sustainable, and that therefore the quashal was for that error alone.

Todd and Lindsey, have prosecuted a writ of error to this court, to reverse this judgment in their favor, on their own motion! And they obtained a supersedeas, by the order of Rezin Davidge. They now insist, that the court erred in not quashing on some other ground, than that assumed in its opinion.

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TODD, &c. vs. M'CLANAHAN'S HR'S.

The revising court will not permit a party, to call in question, a judgment in his favour in its consequences, coextensive with the end sought to be attained.

We had not supposed, that a party would ever be allowed to call in question, in the revising court, a judgment in his favor, rendered at his instance, and effecting every object which he sought, or had a right to attain. The aim of the writ of error, *coram vobis*, was to quash the execution. It was quashed. What more was desired, or expected? The court could have done no more. It was asked to do no more. If the court had forborne to assign any reasons for its opinion, (and it was certainly not bound to give any reasons) no objection would have been made or could be made, by the plaintiffs to its judgment. It could not then have been obnoxious to criticism. It is sometimes prudent to abstain from argument, in support of an opinion. And it often happens, that wrong reasons are given for a right opinion. Such may be the case here. We know that the reason is wrong. But we do not know that the judgment is right. For excess in the execution, the court ought to have corrected, but not quashed it. The appellees have not complained; and therefore we have not felt inclined to do more than our duty, by examining questions which are not judicially presented. We are not required to decide, whether the 2d 3d and 4th errors assigned in the circuit court, or either of them, would be sufficient for quashing the execution.

The plaintiffs succeeded. They ought to have been satisfied with gaining their point, although they may have been baffled in the argument. We are not allowed to give them any extra judicial opinion for a future contingency that may arise. If the court erred in quashing the execution on the motion of the plaintiffs, we have no authority to reverse the judgment at their instance. And should we do so, the consequence would be singular; and not in the slightest degree beneficial to them. It *might* deprive them of the advantage which they now possess. At best we could only direct the circuit judge, either to make a better *argument* or none at all. We doubt our power to enforce such instruction. And we certainly feel no inclination to exert it if we possessed it.

If the court had given other and better reasons for its opinion, M'Clanahan's heirs would not have been

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inhibited from issuing another execution. It will be time enough when they shall issue another execution, to urge the other errors. No decision of them before, could have any effect on any subsequent writ.

If a previous execution for the same debt, had been satisfied, that which was quashed, ought to have been quashed, for that, if there were no other reason for it. If the judgment on which it issued, had been reversed, it ought, for that reason, to have been quashed. But the record does not enable us to ascertain either fact certainly, even if we could judicially decide on them. And it is immaterial in this case to the plaintiffs, how the facts may be. They succeeded below, and therefore must fail here, the other party not complaining.

We must therefore affirm the judgment of the circuit court, with costs against the plaintiffs, but without damages, because, as Mr. Davidge had no authority to supersede the judgment, his order was inoperative.

Talbot, for plaintiff; *Crittenden*, for defendant.

Cooper, Murrell & Reed vs. Hatter et. als. and vice versa.

MOTION.

Error to the Casey Circuit; JOHN L. BRIDGES, Judge.

Case 90.

Sale bond. Quashal. Obligors. Obligees. Statute. Common law.

Judge ROBERTSON, delivered the opinion of the Court.

April 30.

Sale of negro, and bond for the purchase money.

THE sheriff of Casey county sold at auction, a negro, to satisfy an execution in favor of Cooper, and another in favor of Reed and Murrell, against George Galloway; Hatter became the purchaser, and executed, with two securities, a joint bond to Cooper and to Reed and Murrell, for the price, in satisfaction of their executions.

Bond quashed, on motion of the obligors. Aug. 1825.

On the motion of the obligors, the circuit court of Casey, at its August term, 1825, quashed the bond and a *fieri facias* which had issued on it. The reason assigned for the quashal is, that it was erroneous to take a joint bond, payable to several creditors.

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COOPER, &c. vs. HATTER ET ALS. VICE VERSA.

In November, 1825, the obligees in the bond, brought an action of debt on it, against the obligors; to which they filed two pleas: 1st. That "*the consideration had failed*; 2d. That before the date of the writ, the circuit court had quashed the bond. Demurrers to each of these pleas being sustained, judgment was rendered against the defendants by default; from which they have appealed. Whereupon the obligees prosecuted a writ of error to the judgment, quashing the bond. The two cases are consolidated and will be decided together.

Not regular to take sole bond, payable jointly to several distinct creditors, by execution, yet the bond is not void, and cannot be avoided by the obligors. The obligees may avoid or ratify at their election.

The court erred in quashing the bond. There is no statute or rule of law which prohibits such a bond, or renders it invalid. It is not perfectly regular, nor conformable to practice, to take a joint bond payable to several creditors, unconnected by judgment or in interest. The obligees may object to it. They are not bound to accept it. It may operate to their inconvenience and prejudice. Their judgments are distinct; their executions are separate. They cannot be compelled to commingle their interests, and confound their remedial rights. Therefore, they may refuse to recognize the validity of a joint bond, and will be entitled to a quashal of it by the court, especially if it do not specify the amounts of their debts respectively. But it does not follow, that the obligors have a correspondent right. They execute the bond voluntarily. A joint bond may be more advantageous to them than several obligations. The execution of one bond instead of several, cannot possibly operate to their disadvantage; and, therefore, they should not be permitted to take advantage of their own voluntary act, when it is not prohibited by law; "*volenti non fit injuriam*." This is the doctrine of reason, and it is certainly that of the law. See Fant & Catlet vs. Wilson, 3 Monroe, 342; White vs. Richardson, Ib. 176. This principle has been recognized by very many other decisions of this court, the citation of which cannot be now necessary. Whether an execution on the bond could be quashed by the obligors, is not the question here.

If bond, good at common law, though

But if this be not a good statutory bond, it is a valid common law obligation. See Hamilton vs. The Commonwealth, 3 Monroe, 213; Salter vs. Richardson, Ib.

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204. This proposition needs no other support. It is well understood and cannot be questioned. The court, therefore, had no right to quash the bond; it had no power over it except as a statutory obligation. If, as such, it was ineffectual, the court might have quashed an execution issued to enforce it as a statute judgment, but it could rightfully do no more. For by quashing it, the right of the obligees to maintain a suit upon it, was suspended; a right as clear and indisputable as that of an obligee of any bond whatsoever, and which no court should embarrass or postpone in a mode so indirect and summary, as that of quashing the bond on motion of the obligors.

Cooper, &c. vs. Hatter et als. vice versa.

not conformable to statute, error to quash it.

But there is an objection to the quashal, still more striking. The court quashed the bond, but did not quash the sale. The execution was satisfied. All that the creditors had received for their judgments was this sale bond. That being quashed, they had nothing. They could not proceed on their judgment, because it was satisfied by the sale. They could not proceed on the bond, because it was quashed. And thus they were stript of all remedy; and the obligors permitted to take an unjust advantage of their own wrong, and hold the negro without paying a cent; 3 Monroe, 343.

Error to quash sale bond, and not quash the sale.

The judgment quashing the sale bond is, therefore reversed with costs.

In the other case we have felt more doubt. As the bond is good at common law, it might be very plausibly urged, that in this character the court could not affect it by quashing, and that the only consequence of the quashal would be that it could not operate as a statutory bond, on which an execution could issue, and therefore, there would be remedy on it by suit, to which the creditors would be compelled to resort. But the case of Fant, &c. vs. Wilson, *supra*, seems to be decisive on this subject. It is decided in this case, that to quash the bond, nullifies it, and of course destroys all remedy to enforce it. Consequently, on this authority, the judgment on the bond in favor of the obligees, cannot be sustained, the suit having been brought while the judgment quashing the bond was in fullforce. The 2d plea was good, and the demurrer

If bond be good at common law, but bad as a statutary bond, a suit cannot be maintained upon the bond, while judgment quashing the bond, remains unreversed.

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Cox, &c. vs. Cooke.

to it ought to have been overruled. The first plea, however, was insufficient. A plea that the consideration has failed, without showing how, is not good.

The judgment of the circuit court, in this case too, is reversed with costs.

Denny, for Hatter, &c.; *Green*, for Cooper, &c.

Assault & Battery. Case 91.

Cox, &c. vs. Cooke.

Appeal from the Warren Circuit; Henry Brodnax, Judge.

Assault and battery. Moliter manus imposuit. Plea. Issues. Demurrer. Practice.

May 1. Judge Robertson delivered the opinion of the Court.

Statement of the case. This is an action of assault and battery, brought by E. N. Cooke against Phinehas Cox and Wm. Cox. The declaration contains three counts, each of which charges an assault, battery and wounding. Phinehas plead that the plaintiff entered his house against his assent, and that to remove him from it, he gently laid his hands on him, in doing which he "*hurt him a little.*" To this plea the plaintiff replied, that as deputy sheriff of Warren county, he entered the defendant's house lawfully, to levy *ca. sas.* which he had against him. A demurrer to this replication was overruled, and afterwards a rejoinder to it appears in the record, but without any entry by the clerk that it was filed. However, this cannot be material, as the jury was sworn to try "the *issues*," and there was only one issue, unless this rejoinder had been filed and made another issue. It must, therefore, be considered as filed.

Pleas of Wm. Cox. Joint demurrer. William Cox filed two pleas, each of which was, in effect "*moliter manus*," for the entry into the house and for an alleged assault on Phinehas, the father of William. A joint demurrer to these pleas was filed and sustained, as to the one relying on the entry, but overruled as to the other; whereupon an issue was made on the latter.

Verdict of the jury. On these two issues, on the plea by Phinehas and that by William, the jury found a verdict for $37 50 against Phinehas, and one for $75 against William.

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If the demurrer to William's two pleas had been sustained as to both, and either had been good, this would have been error. But if a joint demurrer to two pleas be overruled as to one which is good, and sustained as to the other, which is bad, the defendant cannot object, that separate demurrers were not filed. The irregular practice of filing one demurrer to several pleas or replications, can be disadvantageous only to the demurrant, because, if it be sustained as to all, and any one be good, the error will operate to his prejudice alone. This is the only objection to this summary mode of pleading. But in this case, not only was the plea bad, to which the demurrer was sustained, but the other also, was radically defective.

If joint demurrer to several pleas sustained, and any one good it is error, if overruled, and any one bad likewise error. Practice dangerous to demurrant.

A wounding cannot be justified by "*moliter manus*" alone, without the averment of other circumstances of justification. Before such a plea can be good, it must show *resistance after the request to depart, and damage to the defendant before the wounding ensued;* Robinson vs. Hawkins, 4 Monroe, 135. Neither of these pleas alleged, either a request to depart, resistance by the plaintiff, or damage done by him, to either of the defendants, before they committed the battery and wounding. Both pleas were, therefore, totally insufficient, and issues on them would have been immaterial. For the same reasons the plea of Phinehas Cox was also insufficient; and, therefore, if the replication had been defective, the demurrer to it ought to have been overruled. But the replication is good. And besides, by rejoining, the demurrer was waived.

A wounding cannot be justified by a plea of "*moliter manus imposuit.*" There must be a request to depart, refusal, resistance, and damage to defendant, after such request.

I can see no objection to the judgment. It was rendered jointly against both defendants, on the verdict for $75. The jury had a right to assess several damages, and the plaintiff had a right to take a judgment "*de melioribus damnis,*" against all who were found guilty. And to enable him to do this, no "*remittitur*" of the smaller damages was necessary. He could either enter a *noll prosequi* against Phinehas, and take judgment against William alone, or he could remit the damages assessed against Phinehas, and take a judgment against both for those assessed against William,

In an action of trespass against several, and several verdicts, pl'tff has a right to take judgment against all, upon the verdict he may select.

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SCROGGIN'S ADM'R. vs. SCROGGIN.

or he could, (as he has done) without remitting, have a judgment against both for the larger damages: 11 Co. 7 a; 2 Tidd, 805.

Without noticing, specially, the various objections urged by the plaintiffs in error, I have disposed of them all. There being no error, therefore, in the judgment, it is affirmed.

Denny, for appellant; *Monroe*, for appellee.

MOTION. Case 92.

Scroggin's Administrator vs. Scroggin.

Administrator. Executor. Statute. Circuit Court. Court of Appeals. Costs. De bonis testatoris. De bonis propriis. Plaintiff. Defendant.

May 1. Judge ROBERTSON delivered the opinion of the Court.

Statement of case in circuit court.

ROBERT SCROGGIN filed his bill in chancery, against the administrator of L. P. Scroggin, and against M'Hatton, enjoining a judgment at law, obtained against him, by L. P. Scroggin and M'Hatton. Pending the suit, M'Hatton died, and it was revived against his heirs, and on final hearing, the injunction was dissolved, and the bill dismissed.

This court, at the last fall term, reversed the decree, because the suit ought to have been revived against M'Hatton's personal representative, or the bill dismissed without prejudice, for not so reviving; and gave a decree against the appellees for costs, without qualification.

Motion made at subsequent term to quash the execution,

Execution having issued on this judgment for costs, a motion is now made to quash it, because it has issued against the administrator, "*de bonis propriis*;" and also to correct the form of the decree, entered by the clerk, so as to exempt the administrator from individual liability.

When ex'r. or adm'r. plaintiff liable for costs.

This motion involves the consideration of two questions. 1st. Whether the decree is erroneous, as entered? And 2d. If it be erroneous, can this court now correct it? If these questions can be decided in the affirmative, the execution must be quashed; otherwise it cannot be.

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When ex'r. or adm'r. defendant liable and to what extent, and how judgment to be rendered.

At common law, costs were not recoverable in any suit, by either party. And the statute of Henry the VIII. which gave costs in certain enumerated cases, was never construed to apply to, or include those who sued, "*en autre droit.*" Nor did any subsequent statute in England, which has been in force in this country, subject executors or administrators, to judment for costs. By construction and usage, they have been held responsible in certain cases. An executor or administrator plaintiff, was not responsible for costs when he sued for any cause of action which accrued to the testator, or intestate. But when he sued for a cause of action which accrued to himself, and for which he might sue in his own name, or as representative, he was like other plaintiffs liable for costs individually.

So an executor or administrator defendant, was not liable to costs, unless he was guilty of fraud or of a *devastavit*, or of making a false defence. And when a judgment in such cases, was rendered against him for costs, it was "*de bonis testatoris, si, et si, non, de bonis propriis.*" In such cases, the representative acts on his personal responsibility, and not strictly as a fiducial ry. And therefore the law of costs would apply to him. In this state, executors and administrators are not responsible beyond assets. And hence their liability for costs (when they are liable) is precisely the same as that for the debt of the testator or intestate, and if it be proper to give a judgment for costs, as well as for the debt, the judgment should direct both the debt and the costs to be levied out of the same estate. 1 Litt's. Rep's. 395. Such we understand to be the law here in the courts of original jurisdiction.

The 13th section, of act of 1796, "establishing the court of appeals." Rule as to costs, absolute against appellants or pl'ff if unsuccessful as to appellees discretionary.

But the rule is somewhat different in this court. By the 13th section of the act of 1796, "establishing the court of appeals," it is provided as follows: "In appeals and writs of error, the following rules shall be observed: If the judgment or decree be affirmed in the whole, the appellant *shall* pay to the appellee ten per centum on the sum due thereby, besides the costs in the original suit and appeal."

"If the judgment or decree shall be reversed, in the whole, the appellee shall pay to the appellant, such costs *as the court in their discretion may award.*"

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The 1st clause in the section, is imperative, and has been construed to include all plaintiffs or appellants, as well executors and administrators, as others. Banks vs. Marksberry, 5 Littell's Reports, 144.

It is urged that the other clause should receive the same exposition. We think not. There has been no direct adjudication on this point, so far as we know. We must therefore be governed by our own construction.

Costs given in the court of appeals, against parties who would be subject to costs in the court below. General rule, not to give costs against ex'r. or adm'r defendant.

Whether the last clause includes executors and administrators, it is not necessary now to decide. For if it shall be so interpreted, it will not result necessarily, that it would be the duty of the court, to give judgment in all cases against them for costs. This clause is not, like the other, peremptory. It allows the court to exercise a sound discretion. And in exercising this discretion, it has been the general, if not the invariable practice, not to give judgment against an executor or administrator defendant, for cost, "*de bonis propriis.*" There may be cases, in which it would be proper to render such a judgment, as for example, if the party would have been liable for costs by common law of this state, in the court below. The practice here, has been to render such a judgment, against the defendant, as the law directs in the circuit court. This usage of the court, is founded on good reason. The defendant is brought here without his consent. He cannot avoid coming when summoned. Generally, therefore, he ought not to be personally responsible for the costs in a proceeding against him, which he has not invited, and would gladly have avoided if he could. Not so with the plaintiff, who presents a writ of error. An executor is not bound to prosecute an appeal or writ of error, when there is no error to correct, and therefore, when he does so, he improperly delays the other party, and harrasses him with unnecessary trouble and cost. There is no reason, consequently, why he, more than others, should be exempt from the payment of costs and damages. Hence, the law holds him personally accountable. Far different however is the case of the executor defendant. The law has justly allowed him to occupy safer ground. By the practi-

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cal construction of the act of '96, he is suffered (as we believe he ought to be) to stand as he did before the passage of that act.

CRAIG vs. DURRETT.

Judgment or decree against ex'r. or adm'r for costs, without any express direction to the contrary, is always intended *de bonis testatoris.*

When the court direct a judgment to be entered against an administrator or executor defendant, for costs, without any special instruction, it means generally, that the judgment shall be only "*de bonis testatoris*,' and therefore, if the clerk enrol it, in general terms, as against a defendant in his own right, the entry should be corrected. But this should be done during the same term. We do not say that the court might not rightfully give judgment against a defendant executor or administrator for costs, "*de bonis propriis.*" This point is not now to be settled. All we mean to say is, that, unless the judgment is expressly, "*de bonis propriis*, it should be entered, "*de bonis testatoris*;" because it is intended by the court that it should be so entered.

The court cannot at a subsequent term, correct a judgment or decree, of a prior term.

The court cannot correct its own judgment of a former term; but it can rectify the mistake of its clerk, in recording a judgment, so as to give an effect, different from that authorized by the court. In this case however, the court directed a judgment for costs, without reservation. The clerk so entered it. The record so made up was signed and approved, and therefore, we are not permitted to decide that the error, if any, was a clerical misprision. Consequently, whether there is error in the judgment or not, it cannot now be corrected.

Therefore, the motion must be overruled.

Denny, Attorney General, for plaintiff.

J. J. Marshall 1 jm 365 131 784

Craig vs. Durrett.

ASSUMPSIT.

Error to the Mason circuit; ADAM BEATTY, Judge.

Case 93.

Assumpsit. Evidence, Jury. Verdict.

Judge UNDERWOOD delivered the opinion of the Court.

May 1.

Statement of the case.

DURRETT recovered a judgment against Craig, for $40, in an action of assumpsit, for work and labour in making bale rope. Craig moved for a new trial, which was refused by the court; an exception was filed, and the case brought up for revision.

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CRAIG vs. DURRETT.

Question for revision.

There is but one question presented. Is the verdict and judgment contrary to law or the evidence? A new trial was moved for, solely on the ground, that the verdict was against law and evidence. If therefore the record does not shew that it was contrary to law, or to the evidence, we cannot say, that the court erred in refusing a new trial.

In assumpsit for work and labour, the jury have a right, from their knowledge of the business of society, and the value of labor, to find a verdict for the price of the work done, altho' no evidence what labour was worth, at the time and place the work was done.

There is nothing to show, that the verdict is against law, and the only plausible ground, on which to maintain that it is against evidence, is, that the proof as certified, does not state the price for making the bale rope. We do not reverse the judgment on that account. The quantity manufactured, and the place where it was done, were proved. The jurors were from the vicinage, and we must take it, that they had some knowledge of the value of labour, and the time required to make bale rope. With this knowledge, they had a right from the facts proved, to assess the damages. If in assumpsit for work and labour done, the nature of the work is described, and the number of days the hands are employed is given, or the quantity of work done is proved, although no witness should state the price of laborers by the day, month or year; we think the jury might rightfully assess the damages, and we would not reverse, unless it appeared they had found too much. This court has decided, that the jury may fix the price of the property sued for, from its description, although the witnesses are silent as to price. Why are these doctrines tolerated? Because courts must act, if governed by reason and common sense, upon the presumption, that jurors are acquainted with the ordinary transactions, and business of society, and perhaps, no one thing is so well known, as the value and prices of labour. Jurors will be influenced by their own knowledge, in coming to a conclusion, and it is right they should be. And whenever from the facts proved, it can rationally be inferred, that the jury could, from their knowledge of business, come to a correct conclusion, as to the extent of damages, the party is entitled to; we think courts ought not to controul their verdicts for want of evidence. In this case, it cannot be said that the verdict is contrary to evidence. There is no pretext for saying any more, than that they were not authorized to find, as they did, for want

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of evidence. We think there was evidence enough before them to support their verdict. This opinion does not conflict with the settled doctrine, that it would be improper, for one juror to detail a fact within his knowledge to his fellow jurors in their room, as evidence, which was not stated in open court. OVERSTREET vs. BATE, &c.

Wherefore, the judgment is affirmed with costs.

Depew and *Sanders*, for plt'ffs; *Crittenden*, for def't.

Overstreet vs. Bate, &c.

CHANCERY.

Case 94.

Appeal from the Jefferson Circuit; J. P. OLDHAM, Judge.

Voluntary associations. Trustee. Statute. Church. Advances. Lien.

Judge UNDERWOOD delivered the opinion of the Court.

May 1.

IN May, 1816, James S. Bate and John Bate, jr. executed their obligation to James H. Overstreet, the appellant, and others, trustees of the Methodist Episcopal Church in Louisville, and their successors, for a lot of ground therein described. In 1824, the appellant filed his bill against his co-obligees, and against others who had been appointed trustees, in the places of some of the original trustees who had removed, resigned or withdrawn; and also against the said Bates, alleging that the lot was bought by the obligees in the bond, for the purpose of erecting thereon a house of worship, for the use of the Methodist Episcopal Church, and that the ordinances, rules and regulations of said church, under which said lot was bought, require the conveyance to be made to trustees and their successors forever, in trust, that they should build or cause to be erected, a house or place of worship thereon, for the use of the members of said church, "provided that if the said trustees or any of them, or their successors, have advanced or shall advance any sum or sums of money, or are or shall be responsible for any sum or sums of money, on account of said premises, and they, the said trustees or their successors, be compelled to pay the same, they or a majority of them should be authorized to raise such sum or sums of money, by a mortgage on the premises, or by a sale thereof." The bill further charges that the appellant, at the request of the trustees and William Forquar, Complainant's bill.

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OVERSTREET vs. BATE, &c.

had their note for $1000, discounted in bank, the proceeds of which were applied to building a house of worship on said lot, for the use of the church; that the appellant had paid $250 of the note, out of his private funds, for which he had not been reimbursed, besides another sum of $80, for work done on the building, and that the trustees now refused to pay these demands. Wherefore, the bill was filed to have the lot sold to pay the appellant's claims, and for general relief.

Some of the defendants answered, admitting the justice of the appellant's claims; others denied their justice, insisting they were donations, and also plead the statute of limitations in bar, and the Bates and two others demurred. The court, on hearing, dismissed the bill.

This case not within the act of February 1, 1814; 2 Dig. 1057.

By an act passed February 1st, 1814, see 2 Dig. 1057, any society or sect of christians in this commonwealth, associated in congregational form, are authorized to acquire, not exceeding four acres of land, for the purpose of erecting thereon a house of worship, grave yard and pound for horses. The act points out the manner of vesting the title in trustees, for the use and benefit of the congregation, and provides for a succession of trustees, not exceeding five, to support the title. The trustees vested with the title, are authorized "to do any legal act in conducting the same, which may be necessary for the uses aforesaid," that is, for the erection and preservation of a house or houses of worship, making enclosures, &c. for the accommodation of the congregation. In carrying into effect the objects contemplated by the legislature, all necessary incidental powers, by implication, are vested in the trustees; and in their conduct and management of the property, we see no reason why they may not create a lien upon it for improvements and repairs. Such power is not prohibited and we think its exercise may often become essential to the comfort and welfare of the congregation. The trustees may not be disposed to render themselves individually liable to mechanics for improvements. It may be important to have work speedily done, either to finish or repair a building. This might be accomplished by creating a lien

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on the property when, if a lien could not be given, the buildings would not be erected or would be suffered to decay and thus the objects of the law, providing for the dissemination of religious instruction, by furnishing suitable houses in which it may be done, would be defeated. It does not appear in the present case, that the legal title to the lot in question, has ever been vested in trustees, according to the act of assembly. The inference is conclusive to the contrary. By the act of assembly, five trustees are to be selected and their names entered on the records of the county court; no such thing appears to have been done in this case. The bond on the Bate's, exhibited, indicates that the legal title yet abides in them. We cannot, therefore, derive any aid from the act of assembly, in deciding the present controversy.

The chancellor will lend his aid, to effectuate the objects of voluntary associations for the diffusion of religion; but in doing this he will see that justice is done to each of the associates. Appellant had a lien on the lot improved, for his advances.

This must be regarded as an association of individuals, to accomplish the benevolent and laudable purpose of erecting a house for religious worship, and who have not yet placed the title of the property acquired for that purpose, in trustees, as provided for by law. We have no doubt that courts of chancery may interfere to give efficacy to these individual associations, since the passage of the statute. Their purpose may be regarded as a trust, which the chancellor will see executed according to the intent of the parties. But whenever application may be made to a court of equity to that end, the chancellor ought to survey all the circumstances, and see that justice is done to each individual concerned, before the property in which he has an interest, is set apart for religious uses. In this case the appellant is one of the obligees in the bond executed by the Bate's for the title. He has, therefore, an equitable interest in the bond, and might insist that the Bate's should convey to him and his co-obligees, and thus the obligees would be invested with the legal estate, as joint tenants. Would the chancellor deprive the appellant of his portion until he had been paid, whatever he had expended on the property over the amount of his donations, when such excess of expenditure was made, under circumstances showing an intention to claim a reimbursement? We think not. To the amount of such excess the appellant, in conscience, would have fair claim in such a case, and we are of

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OVERSTREET vs. BATE, &c.

opinion that the present is that case. At the time the appellant expended his money he was acting in the capacity of a trustee for the association, and by the rule which was evidently adopted for the government of the conduct of the trustees, and under which we think it clear the appellant acted, he had a right to look to the lot he was improving, to be indemnified for his excess of expenditure, over and above his donations.

The statute of limitation does not run between the trustee and *cestui que trust* The operation of the statute is reciprocal. The statute would not bar a claim of the appellees, against appellant; neither will it bar a claim of appellant against appellee, growing out of the same relation.

This brings us to the consideration whether the expenditures by the appellant, over and above his subscriptions or donations, have been made so long that his claim is barred by lapse of time; for it is clear from the admissions of the defendants, or part of them at least, and the proof, that the appellant expended much more than he subscribed, and we are equally satisfied that the evidence will not justify the conclusion that he ever made a donation of such excess for the benefit of the church. It is established as proof, that he said, in substance, while excited, that he never expected to get his money, and that if the trustees required it, he would give them a receipt; but it does not appear that such a thing was required of him by the trustees, and we cannot infer from the conversation, any deliberate intention on his part, to give, and no act was done amounting to a gift. The appellant must, therefore, recover, unless he has lost his right by his negligence in bringing suit. We are of opinion that the statute of limitations does not constitute a bar, although there were more than five years between the times the appellant expended his money, and the time he instituted this suit. The statute does not, in terms, apply to a case like the present. The appellant has no remedy at law. We perceive no principle upon which to apply the statute as a bar. If it be the case of a trust, express adjudications show that the statute has no application to shield the trustee, were the claim against him. See 3 Litt. 181. If the trustee is not protected, we perceive no forcible reason why his claims should be barred. The case of Costar vs. Murray and Murray, 5 Johnson's Chan. Repts. 522, also establishes the principle that the statute of limitations does not apply to a direct trust, as between trustee and *cestui que trust*. In this case there can be no doubt of the existence of

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a trust interest, held by the appellant and his co-obligees. The bond on the Bate's clearly shows it, and if there was any ambiguity, the parol evidence demonstrates it, without being inconsistent with the writings. This is admissible. See Steere vs. Steere, 5 Johnson's Chan. Repts. 1. Moreover, here is a joint, equitable interest, held by the appellant and his co-obligees. It does not appear that this interest has ever been divested, although it would seem that the appellant is no longer regarded as a trustee by the members of the church. This interest has been vested in the appellant by the title bond, and cannot be divested, unless he assigns it voluntarily, or is compelled to surrender it by judicial sentence. Neither has yet been done. Only part of the defendants rely on the statute of limitations. While others, so far from relying on that bar, expressly recognize the justice of the claim. An acknowledgement by one administrator, of a debt or account, will bind his co-administrator and take the case out of the operation of the statute of limitation. Hord's administrators vs. Lee, &c. 4 Monroe, 36. They are but trustees appointed by the law, to manage the goods and chattels, rights and credits of their intestate, and there is strong ground in this case, for contending by analogy, that the acknowledgement of the appellant's claims by part of the defendants, acting in the character of joint trustees, should bind the others. But of this we will give no decisive opinion. It is enough that we have reached the conclusion that the statute, as relied on in this case, constitutes no bar.

The demurrer should have been overruled. The legal title yet abiding in the Bate's, they were proper parties, and in case of a sale of the lot to raise the money, the court should direct a conveyance from them to the purchaser.

This opinion may, probably, have a bearing on many cases similarly situated, and while we shall cautiously avoid running into the doctrines and assuming the powers exercised by the English chancery, in regard to charitable uses, under their statute of 43 Elizabeth, we shall, nevertheless feel ourselves bound, when cases are properly brought before us, to see that associations of Christians are protected in their congregational

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GENTRY vs. GILKEY.

rights, under the act of 1814, and that trustees of property, set apart for religious uses, shall likewise be secured in their legal expenditures, for the improvement and preservation of the property. And although we have already said, that the condition of trustees under this act, is not strictly analogous to the present case, yet in principle, there is but little difference, and if any, it is in favor of the appellant's claim to relief. We have not thought it important to enter into a minute calculation of accounts. We will leave that to be done by the circuit court, upon the principles of this opinion, when the cause shall be again opened before it.

Decree and mandate.

The decree of the circuit court is reversed and set aside, and upon the return of the cause, that court must ascertain, by commissioners or otherwise, the amount expended by the appellant, in improvements on the lot, out of his individual funds, and in payments to others for work, labor and materials, in improving the lot, over and above the amount subscribed by him, as a donation or donations, and render a decree in favor of the complainant, for such excess, subjecting the lot to sale for its payment, if not paid by a day to be given for that purpose; and said court will make all such other orders and decrees as may be proper to carry into effect the principles settled in this opinion, so far as they relate to the present controversy, all which is ordered to be certified. The appellant must recover his costs.

Denny, for appellant.

MOTION.

Gentry vs. Gilkey.

Case 95.

Error to the Madison circuit; GEORGE SHANNON, Judge.

Motion. Constable. Commonwealth's paper. Jurisdiction. Circuit court.

May 2.

Judge ROBERTSON delivered the opinion of the Court.

Motion against a constable, in the circuit court for failing to

GENTRY issued a *fieri facias* against one Robert Burton, for $20, and costs and interest, with an endorsement that Commonwealth's paper would be received. It was delivered to Gilkey, as constable, to collect. Having failed to return it within twenty days

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after the return day, Gentry moved against him, in the circuit court, to recover the amount with the damages, for his failure to make the return. And the court dismissed the motion, on the ground that the amount was less than five pounds.

return an execution for $20, in commonwealth's paper, interest and costs. Ruled, the court had jurisdiction, the face of the execution the nominal, not the intrinsic specie value of the paper, gives jurisdiction.

This, we think, was erroneous. It was the nominal amount on the face of the execution, which determined the question of jurisdiction. Craig vs. Street, 2 Bibb, 265; Singleton vs. Madison, 1 Ib. 345; Hume vs. Ben. Ib. 403; and many subsequent cases. The court could not, judicially, know that the amount in this case would be less than five pounds. A motion may be sustained for Commonwealth's paper. Jones et al. vs. Overstreet, 4 Monroe, 547, and the cases there cited. And we are inclined to think that whatever may be the proof of the real specie value of such paper, its nominal amount must give jurisdiction. Consequently, if the court could have known, judicially, that the value in this case, was less than five pounds, it ought, nevertheless, to have decided the motion on its merits.

Judgment reversed.

Turner, for plaintiff; *Caperton*, for defendant.

Dougherty's Administrator vs. Goggin.

ASSUMPSIT.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Case 96.

Assumpsit. Parol contract for land. Failure to convey. Consideration. Right of action. Devisee. Administrator, with will annexed.

Judge ROBERTSON delivered the opinion of the Court.

May 2.

NANCY DOUGHERTY owned an estate in land, slaves and money. She had no children. Her two sisters were her nearest relatives, and the only persons who would be entitled to her estate, by inheritance. One of these was the wife of the defendant, with whom Nancy Dougherty lived. In the year 1825, the defendant received from the sheriff of Madison, $711, for Nancy Dougherty, on an execution in her favor, against Wm. Barnet. In the same year she executed the following receipt to the defendant:

Statement of facts, as proved in the cause.

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DOUGHERTY'S ADM'R. vs. GOGGIN.

"Received of Stephen Goggin, in full of all dues, debts or demands, up to this present date, &c. &c. this 5th day of November, 1825.

NANCY DOUGHERTY."

Attest. *Robert P. Stapp.*

It was proved by Stapp, that before the date of the receipt, she bought from the defendant a tract of land, for which, among other things, she gave him the $711 received by him, for her, from Barnet. This was also abundantly proved by others. The contract for the land was verbal, and no memorandum of it was ever reduced to writing. This also is abundantly proved.

N. Dougherty's will.

Nancy Dougherty, shortly after the date of the receipt, made her will, in which she devised this tract of land to her unmarried sister, Letitia. Which will was proved in January, 1826.

Administration with the will annexed, granted to Kennedy.

Joseph Kennedy administered, with the will annexed, on the estate of the testatrix; and in that character brought this suit *in indebitatus assumpsit*, to recover from Stephen Goggin the money which he had collected for Nancy Dougherty.

The will offered in evidence, and rejected; bill of exceptions.

After the foregoing facts were proved, (with the exception of the will) the plaintiff offered the will in evidence, stating to the court, (as appears by the record,) that his object was, after showing the will to the jury, to prove a demand by the devisee, of the title to the land, from Goggin, and a refusal by him to make it. The court refused to admit the will. The plaintiff then proposed to prove a demand of the title, by Letitia, who, as heir without the will, would be entitled to a moiety of the land. The court also refused to permit this testimony. To each of which opinions, on the admissibility of the testimony offered, the plaintiff excepted.

In parol contracts, the right of vendee to action for the consideration depends upon the willingness and abil-

In parol contracts for land, the purchaser may maintain an action at law, to recover the consideration which he may have advanced, provided the vendor had failed and refused to convey, according to the contract. If there had been no delinquency on the part of the vendor, and he had been able, ready and willing to perform his contract; assumpsit being an equitable action, would not be tolerated for the reclamation of the price

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paid by the purchaser. In this case, therefore, if the jury had been satisfied that Nancy Dougherty had bought the land from Stephen Goggin, by a parol contract only, and had paid him the consideration, or any part of it, and that he had been guilty of a breach of his contract to convey, and had shown an unwillingness to do it, they ought to have found a verdict for the plaintiff, "*pro tanto.*"

Liability of vendor to convey.

As there was no proof of any condition in the contract, as to the time of conveyance or a demand for it, Goggin was bound presently to make the title. And for failing to do so, suit might have been brought at any time without demand. Griggs vs. Bondurant, 3 Monroe, 178; Dun and ux. vs. M'Millan, 1 Bibb, 409. We are, therefore, of opinion, that the contract and payment being satisfactorily proved, a right of action vested in the administrator, without proof of a demand.

When conveyance not to be made on a day, or on demand, or on condition, covenanter is bound to convey presently, and no demand necessary to a right of action.

But proof of a demand and refusal would fortify the equity and morality of the claim to the money, and therefore, any competent testimony on that point, would have been admissible. Hence it was proper to offer the will. That vested in Letitia Dougherty, the right to the land. By showing this and the refusal of Goggin to make her a title, the right of action for the money, would be irresistible. The court, therefore, erred in refusing to admit the evidence offered. The plaintiff might be entitled to recover without this additional proof. But as it tended to make his claim stronger and more obvious, he had a right to use it before the jury. Goggin is certainly not entitled to the land and money both. If he has been unreasonably delinquent, and has been willing to take refuge under the statute of frauds and perjuries, the right of the administrator to the money would be indubitable. The testimony offered would have conduced to prove, the renunciation by Goggin, of the contract, and a disposition on the other side, to abide by it in good faith.

The plaintiff entitled to recover without the evidence offered and rejected, yet if the evidence were calculated to strengthen his case, it is an injury to him to exclude it, consequently error.

The administrator alone, under the circumstances proved, would have a right of action. The breach, if any, was in the lifetime of the testatrix, as well as afterwards. The refusal since, to convey, (if he did refuse,) is evidence of Goggin's indisposition to do it before. But in such a case we should be inclined to

Right of action in the adm'r. alone.

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BALLARD vs. DAVIS.

the opinion that, if the contract had been to convey on demand, and no demand had been made, until after the death of the testatrix, the assumpsit for the consideration advanced by her, should be brought in the name of her personal representative. The court ought, however, to have awarded a new trial.

Judgment reversed, and the cause remanded for a new trial, to be conducted according to the principles of this opinion.

Turner and *Breck*, for the plaintiff; *Caperton* and *Goodloe*, for defendant.

Motion.

Ballard vs. Davis.

Case 97.

Error to the Madison Circuit; THOMAS M. HICKEY, Judge.

Injunction. Dissolution. Damages. Execution. Motion to quash.

May 2.

Judge UNDERWOOD delivered the opinion of the Court.

Motion to quash, and overruled.

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BALLARD moved the Madison circuit court to quash an execution which issued against him in favor of Davis, for $274 12, which, as the execution states, were recovered for damages on the dissolution of an injunction. The ground on which the plaintiff in error relied was, that there is no judgment or decree of the Madison circuit court, which authorizes the execution. The court overruled the motion; exceptions were taken to the opinion of the court, and the case has been brought up for revision.

Statement of the facts appearing in the record.

It appears from the record, that Ballard contracted with Davis for a tract of land, at the price of $7000, and having failed to pay $2000, part of the purchase money, which became due on the 1st of September, 1819, Davis sued and obtained judgment. Ballard filed his bill to enjoin the judgment. Davis answered and made his answer a cross bill against Ballard, and brought John Jarman before the court, as a defendant to the cross bill. On the trial in the circuit court, a decree was rendered, perpetually enjoining Davis from collecting his judgment from Ballard, and giving Davis a decree against Jarman. The parties prosecuted writs of error to this court, and in January, 1827, the

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causes were decided by reversing the decrees of the circuit court, and remanding the cases, with directions to dismiss the bill and cross bill respectively, with costs, and "*the injunction of Ballard to be dissolved with damages.*" The mandate of this court being returned to the circuit court, Davis moved the court to give him judgment for damages, on the amount of the judgment at law mentioned in Ballard's bill; and the court being somewhat perplexed how to proceed, because, on examination, it turned out that no injunction had ever been granted in favor of Ballard, and no injunction bond was ever executed by him, at length entered the following decree immediately following the decision of this court: "Whereupon, in pursuance of the foregoing opinion of the court of appeals, it is decreed and ordered, that the original bill herein, of the complainant Ballard, be, and the same is hereby dismissed, and that the said Ballard pay to the defendant, Davis, his costs about his defence expended, and *also the damages mentioned in the foregoing opinion.*"

A decree for damages without specifying the amount, or giving the data by which the amount can be ascertained, does not justify the emanation of an execution.

There is nothing on record to justify the execution, but the words italicised. And the question is, are they sufficient? We think they are not. It is well settled by the adjudications of this court, that the rate of interest must be expressed in the judgment. The reason is equally strong for having the rate of damages expressed in a decree. Every judgment or decree should contain on its face, the data upon which it may be ascertained with entire certainty, how much the court has adjudged or decreed in favor of either party. We do not intend to say that this may not be done by reference to papers filed or to records, or even to the law, general or particular. *Id certum est quod certum reddi potest*, is the maxim. But in this case the judgment or decree does not ascertain the amount of damages which Ballard is to pay, by stating the amount on the record, or by reference to any thing else, as the basis of calculation, and giving the rule by which to calculate the amount. We are, therefore, of opinion, that there is no such judgment or decree in this case as would authorize the clerk to issue the execution;

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DEPEW, &c. vs. BANK OF LIMESTONE.

and hence it follows, that the court, on the motion of Ballard, ought to have quashed the execution.

The amount of damages should be ascertained in the decree.

We have observed that it is the practice in some courts, in decreeing damages merely, to state that the party shall recover ten per cent. damages on the judgment at law enjoined, where the injunction is dissolved. We will not say that this practice is erroneous, but we do not hesitate to declare that it would be preferable for the court to state the amount of damages awarded in the decree.

The acts of assembly giving damages, do not apply to injunctions *decreed*, but to injunctions granted before final decree.

It moreover appears, that no injunction had ever been obtained by Ballard, unless the decree of the court in his favor, on hearing and final trial, can be regarded as such an injunction, as will justify giving the damages on its reversal. We are of opinion that the acts of assembly, giving damages, do not apply to injunctions *decreed* on final hearing, but only to injunctions *granted* before final decree. However, it is not essential to consider this question now, for if the decree gave damages, although they may have been improperly awarded, the decree should be enforced, and should be regarded as obligatory until reversed.

Decree void for uncertainty.

The decree for damages is considered void, for its uncertainty, and it is on that point, we are of opinion, the execution should have been quashed. The decision of the circuit court is reversed, and the cause remanded, with instructions to enter judgment quashing the execution. The plaintiff in error must recover costs.

Turner, for plaintiff; *Caperton*, for defendant.

DEBT.

Depew & Wood vs. Bank of Limestone.

Case 98.
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Error to the Mason Circuit; W. P. ROPER, Judge.

Service of process. Sheriff's return. Abatement. Pleas. Practice. Corporation. Independent Banks. Statutes.

May 2.

Judge UNDERWOOD, delivered the opinion of the Court.

Nature of the action.

THE plaintiffs in error were sued in the Mason circuit court, in an action of debt, by the defendant in error.

Writ and Sheriff's return.

A writ issued, directed to the sheriff of Mason, who returned the same executed on Wood, and that Depew was no inhabitant of the county.

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Depew's letter of attorney to Reed.

Depew, by letter of attorney, authorized Walker Reed, to acknowledge service of the process for him, which was done (but not ten days before the court to which the process was returnable) by filing the letter of attorney, and acknowledgement endorsed thereon in the clerk's office.

Pleas by Depew and Wood.

Depew and Wood, on the 11th day of the term, filed two joint pleas, both commencing and concluding in bar, and both of which were sworn to, by W. Reed. The first plea denies, that any such persons, as the plaintiffs were in existence at the time the writ issued, or at the time of filing the plea. The suit was set for trial, on the 10th day of the term.

Motion for continuance, and overruled.

On the calling of the cause for trial, Depew and Wood, by their attorney, moved for a continuance upon the ground, that Depew had not acknowledged service of process, ten days before court. The court refused to grant the continuance, upon the ground, that it was asked, for purposes of delay.

Abatement as to Depew, pleas rejected, and judgment rendered.

The court rejected the pleas filed, as being pleas in abatement, because they were not filed on the 10th day of the term, and proceeded to render judgment against Wood, disposing of the cause, as to Depew, by abatement. Various errors are assigned, which need not be stated particularly.

Depew had no right to enter himself a defendant, to procrastinate trial, contrary to the provisions of the act of 1812. The sheriff's return, gave the plaintiff a legal right to proceed against Wood alone.

1st. It is contended, that the court illegally refused to consider the case. This question depends on the right which Depew had to enter himself a defendant when process had not been served upon him, and thereby, to procrastinate the suit upon the ground, that he had not entered himself as a defendant, by confessing service of the writ, ten days before court. We cannot grant, that Depew had a right voluntarily to enter an appearance, and thereby to procrastinate the trial, and defeat the express provisions of the act of 1812, which in substance declares, that when the sheriff shall return that one of the defendants in the writ "is not an inhabitant of his county," the plaintiff may proceed to judgment against the others, without further proceedings against the defendant returned "not found." The sheriff in this case returned, that Depew was not an inhabitant of Mason county. This return, gave the plaintiffs a legal right to proceed against Wood

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DEPEW, &c. vs. BANK OF LIMESTONE.

alone, which cannot be defeated, by an act of Depew, against the will of the plaintiffs. The process having been executed on Wood, more than ten days before the court, at which the suit was tried, it follows, that the court did not err in refusing a continuance.

The court correct, in rejecting the pleas.

It also results, that the cause was properly set for trial on the 10th day of the term, although the writ had been executed on Wood alone; and hence, if the pleas filed were pleas in abatement, they came too late and were properly rejected by the court. The parties in the court below seem to have treated the pleas, as pleas in abatement. They were doubtless verified on oath, under that idea. As to the second, we have no doubt that it contained matter in abatement only, although it commenced and concluded in bar, and was, therefore, properly disregarded. As to the first plea, it is doubtful whether its matter should be regarded as matter in abatement or bar, but whether it belongs to one or the other class, we are of opinion it constituted no defence to the action, and was, therefore, properly rejected. Pleas not adapted to the nature of the action, may be regarded as nullities. Crew's administrator vs. Newland, 3 Monroe, 136. Pleas rejected by the court and which constitute no defence, although they may seem to be adapted to the nature of the action, cannot deserve greater consideration.

If plea rejected, though more regular to have required a demurrer, yet the cause will not be sent back for the purpose of having judgment on demurrer, entered against the plea.

If the first plea is bad, it would be a useless waste of time to reverse the cause, when no other purpose could be answered by so doing, than to let in a demurrer to the plea, in order to have judgment rendered for the plaintiffs on demurrer. The validity of the first plea is as fairly presented now as it would have been had it come up on a demurrer to it. And the reasons which induce us to decide the plea bad, are these. The note sued on estops the defendants, and will not permit them to deny the legal existence of the plaintiffs, at the date of the note; besides, we know, as matter of law, that the plaintiffs then had a corporate existence. We also know, as matter of law, that the plaintiffs had such existence at the time of issuing the writ, and at the time of filing the plea, as authorized them to maintain their action.

Defendant estopped by his note, from questioning the existence

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It was supposed in argument, that an examination of the acts relative to the Independent Banks, would show that the plaintiffs had no legal corporate existence, for the purpose of maintaining their suit at the date of the writ, and when the plea was filed. The opposite conclusion has resulted from the examination. The act of 10th February, 1820, repealing the charters of the Independent Banks, continued their powers to sue until the 1st of January, 1823. An act passed 7th January, 1824; Section 14, in connexion with section 11, gives those institutions power to sue until 1st of March, 1827. This suit was instituted and decided in 1826. It is clear, therefore, that the plea was against law, unless something can be found taking the Bank of Limestone out of the general provisions of the statutes referred to, and making it an exception. The 12th section of the act last referred to, is relied on as having that effect. It cannot. That section only confirms the appointment and election of certain officers, and vests power in them for one year. If their appointments were never renewed, and no others elected in their places, it would not follow that the corporation was thereby dissolved. But it does not appear from the plea, nor the affidavit in support thereof, that commissioners were not appointed to close the concerns of the Bank of Limestone, (which, under a state of case, that probably existed, and which is not negatived, could have been done,) after the expiration of the year, during which Langhorn and others, under the said 12th section, were authorized to act. If commissioners were never appointed, we do not concede that such an omission would, if shown, defeat the action. We perceive no error in the record, and if, as has been stated in argument, one of the defendants is entitled to a set off, the law will furnish redress, and we feel assured, that the legal research and talent of the gentleman concerned, will not fail to point out the proper remedy.

of the plaintiff, at the date of the note.

Examination of the acts of assembly, relative to the Independent Banks. If commissioners were appointed, the action not necessarily defeated.

The judgment is affirmed with costs, but without damages, as the *supersedeas* was granted in a manner which this court cannot recognize.

Depew, for plaintiff; *Brown*, for defendants.

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APPEAL.

Haydon vs. Christopher.

Case 99. Error to the Madison Circuit; GEORGE SHANNON, Judge.

Promise. Statute of frauds and perjuries.

May 4. Judge ROBERTSON delivered the opinion of the Court.

Nature of the case. MRS. HAYDON warranted Christopher for $20, and obtained a judgment. Christopher appealed to the circuit court, and there succeeded, by the instructions of the court.

Evidence on the part of plaintiff. The only evidence on the trial, was that adduced by Mrs. Haydon; she proved that Cock was indebted to her for the hire of a negro woman, $25; that she had procured a warrant against him for the debt, and could have made it; but that Christopher, who stated that he owed Cock about $26, to be credited by a small account due by Cock to him and his partner, not exceeding $6, promised to pay her $20, if Cock would assent to it; that Cock being informed by Christopher and her agent, of the proposition, gave his assent, and thereupon Christopher and Cock made a settlement, and agreed that the balance due to Cock was $20, which Christopher then assumed to pay to Mrs. Haydon; in consideration of which assumpsit, Cock was discharged from her debt, and her warrant dismissed, and Christopher discharged from Cock. It was also proved, that on the day after this arrangement, Cock fled from the state, and that Christopher then stated, that his account with himself and partner, was much larger than he had supposed.

This is the substance and legal effect of the evidence. Christopher introduced no witness, and did not attempt to prove how much Cock owed himself and partner, or whether any thing.

Instructions of circuit court. On this proof, the court instructed the jury, that they could not find for Mrs. Haydon, unless the promise of Christopher had been in writing. To this opinion she excepted, and has prosecuted her writ of error with a *supersedeas*.

When an assumpsit, is directed to pay the dedt of another, on a We are at a loss to perceive how the statute of frauds and perjuries can apply to such a promise, as that established in this case. It was not a collateral undertaking, to pay the debt of Cock. It was a direct assumpsit, on a valuable consideration from

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Mrs. Haydon, to pay his (Christopher's) own debt. Cock could not, afterwards, have recovered his debt from Christopher, nor could Mrs. Haydon have enforced hers against Cock. The assumpsit of Christopher, therefore, was an original, direct undertaking to pay his own debt, and therefore, is not within the statute. See 1 Comyns on contracts, 58; 3 Burrow, 1886; Armstrong vs. Flora, 3 Monroe, 44.

valuable consideration moving from the party, to whom the assumpsit is made, whether to the person making it, or to the person whose debt is assumed, the case is not within the statute of frauds and perjuries, and the promise may be enforced though not in writing.

If we have not given too strong an effect to the evidence, (and we think we have not,) there can be no doubt that Christopher is not protected by the statute of frauds and perjuries. But even if it had not been expressly proved, that Cock was relieved from Mrs. Haydon, and Christopher from Cock, certainly the jury had a right to deduce for themselves, such an inference from the circumstances; and if they had believed that Cock was released from Mrs. Haydon's demand, by the acceptance by her of Christopher's assumpsit, they would have been bound to find for her.

Christopher could not avoid his assumpsit, by alleging, that he was mistaken in the amount of Cock's debt to the firm, after having procured his release from Mrs. Haydon. Besides, he did not attempt any proof on this point. The court had no right to direct a nonsuit.

In whatever view the instruction of the court and verdict of the jury can be considered, they cannot be sustained.

Judgment reversed and the cause remanded for a new trial.

Caperton, for plaintiff; *Turner*, for defendant.

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CHANCERY.

Trustees of the town and meeting house of Perryville vs. Letcher, &c.

Case 100.

Error to the Garrard Circuit; JOHN L. BRIDGES, Judge.

Bill in chancery. Non est factum. Jurisdiction. Estoppel. Trustees.

May 4.

Judge UNDERWOOD, delivered the opinion of the Court.

History of the suit at law, Letcher vs the plaintiffs in error.

LETCHER instituted an action of covenant against the trustees, founded on a covenant to which they, Ewing and Letcher, were parties. The covenant relates to the building of a meeting house in Perryville, of which Ewing was the undertaker. It stipulates for the surrender, by Ewing and Letcher, of various materials, to the trustees, for finishing the building. Among other things, the covenant states that "it is further understood by the trustees, Ewing and Letcher, that the said Letcher is to take an order on said trustees, from Ewing, for the amount of what the brick work may amount to. The trustees agree the order from Ewing to Letcher be paid to said Letcher." This extract is taken from the covenant as set out in the declaration. Letcher, on trial, recovered a judgment for $397; the defendants making defence by a demurrer to the declaration, and six pleas, in all of which they were overruled by the court. To reverse this judgment, the defendants prosecuted a writ of error to this court, which affirmed the judgment with damages.

The bill of the trustees.

The defendants then filed their bill in chancery, to be relieved against the judgment, which being dismissed, they have prosecuted a writ of error to reverse the decree of the circuit court. The bill charges that Ewing and Letcher were partners; that $601 69½ had been paid to Ewing, $60 40 to Letcher, besides $75 which Letcher had credited on the order drawn by Ewing, in his favor, on the trustees, and that these sums exceeded the value of all the work done by Ewing and Letcher, on the meeting house. The bill charges that Ewing and Letcher are insolvent, and that they were prevented from proving payments on the trial of the suit against them, brought by Letcher. Wherefore, they pray for a set off against Letcher's judgment. The trustees also complain that the cove-

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hant on which the suit was founded, had been materially changed, to their prejudice, without their knowledge.

The answer of Letcher.

Letcher answered, denying his insolvency, and the charges relative to the alteration of the covenant and the partnership between him and Ewing, and asserts that the complainants obtained credit on the trial at law, for all payments made to him, and that he is not responsible for money paid to Ewing.

The alteration of a writing, cannot be taken advantage of, to defeat the writing by bill in chancery; unless satisfactory reason given, why *non est factum*, not plead in law.

The points for adjudication, are sufficiently obvious by contrasting the allegations of the bill, with the denials of the answer. The alleged alterations of the covenant cannot, in this suit, constitute an available defence against the judgment at law. If true, the plea of *non est factum* would have afforded the proper remedy at law. The complainants have not, satisfactorily accounted for their failure to make that defence.

The trustees estopped by their written contract, from considering Ewing and Letcher partners, and demanding Letcher, to be charged with payments made to Ewing. Record shews that they had credit for the payments made Letcher, on the trial at law.

The written contracts are a sufficient answer to those allegations of the bill, which assert that Ewing and Letcher were partners, and possessed such a joint interest as to make the sums paid to Ewing a valid discharge of the sum due Letcher, for the brick work. The quotation from the covenant declared on, shows clearly, that Letcher was to be paid separately, for the brick work. The provisions of the written contracts cannot be assailed by parol evidence, unless fraud or mistake in reducing the contracts to writing, had been averred and established by proof. This has not been done. The payments made to Ewing, therefore, cannot be allowed as a set-off against Letcher's judgment. The trustees, by the terms of their written contract, have estopped themselves, and cannot demand such a thing as matter of right, either at law or in equity. The payments made to Letcher stand on a different footing. If these have not been allowed as credits, on the trial at law, the complainants are now entitled to them. From an inspection of the common law record, made an exhibit in the chancery proceedings, I am of opinion that the payments made to Letcher, were allowed as credits, and did diminish the damages, *pro tanto*. The order drawn by Ewing, on the trustees, in favor of Letcher, was for $481, from which deduct $75, the credit endorsed, and $60 40, claimed in addi-

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TRUSTEES, &c. vs. LETCHER, &c

tion, by the bill, and the remainder, with the addition of legal interest from the time the trustees were bound by their covenant to pay it, up to the rendition of the verdict, would equal the damages assessed. A bill of exceptions filed in the common law suit, states that the trustees had sundry witnesses called and sworn, and were proceeding to prove by them, for the purpose of lessening the damages, that they had made sundry payments to Stephen G. Letcher, on account of the brick work, also to prove payments made to Ewing, &c. when the plaintiff objected to the proof of payments made to Ewing. The court sustained the objections and would not permit the evidence in relation to the payments made to Ewing, to go before the jury. It does not appear that the plaintiff objected to the evidence of payments made him, and as the trustees introduced witnesses on the subject, the inference is irresistable, that they were heard as to the payments made to Letcher. There is, therefore, no error in the decree of the circuit court, dissolving the complainant's injunction, and dismissing their bill as to Letcher and his assignee, Smedley.

Ewing was properly before the court and there should have been a decree against him, for the sum which he had enabled Letcher to draw from the trustees improperly.

But in relation to the defendant, Ewing, the circuit court erred. He was so connected with the contract and business, that he was properly before the court, and being there, the court ought not to have dismissed the bill as to him, and given him costs. Ewing, in his answer, acknowledges that, at the time he drew the order in favor of Letcher, on the trustees, he and Letcher had received in payments, the value of all the work done by them, and that he was prevailed on by Letcher, to draw the order, notwithstanding the trustees had paid all that was due. He says his design was not fraudulent, but that his intemperate habits disqualified him for business, and intimates that Letcher improperly persuaded him to do it. There is no proof that any imposition was practised by Letcher, in procuring the order. If then, as Ewing admits, there was nothing due when the order was drawn by him, and he has put it in Letcher's power to recover from the trustees, when Ewing ought to have paid, having received from the trustees more than $600, he should be compelled to indemnify the trustees to the

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extent of Letcher's recovery against them. The court should, therefore, have calculated legal interest on the amount of the judgment in favor of Letcher, against the trustees, up to the time of rendering the decree, and then decreed the gross amount against Ewing, in their favor, together with costs in the chancery suit. GULLY vs. GRUBBS.

The decree of the circuit court is, therefore, reversed, in relation to the defendant, Ewing, with costs, and the cause remanded, with instructions to render a decree against him, in conformity to this opinion, and the decree of the circuit court in relation to Letcher and Smedley is affirmed with costs and damages, on the damages decreed in the circuit court.

Denny and *Green*, for plaintiffs; *Haggin*, for defendants.

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1jm 387 138 32

Gully vs. Grubbs.

ASSUMPSIT.

Error to the Madison Circuit; GEORGE SHANNON, Judge. Case 101.

New trial. Instructions. Witness. Surprise. Statute of frauds and perjuries.

Judge ROBERTSON, delivered the opinion of the Court. May 5.

HIGGERSON GRUBBS sold and conveyed to Elias Gully, fifty acres of land; the deed for which acknowledged the receipt (in the usual form), of $150, the consideration. Gully dee'd. Grubbs to

Several years after the date of the deed, Grubbs brought an action of assumpsit against Gully, for the consideration for the land. Assumpsit for consideration.

On the general issue, there was a verdict for the defendant. A new trial was granted, on the affidavit of Grubbs, which stated that Crews, a witness summoned by him, and in attendance when the jury was sworn, and by whom he could prove that Gully had not paid the $150, had unexpectedly disappeared, so that he was deprived of the benefit of his testimony, &c. Verdict for def't. and new trial upon affidavit of plaintiff.

In a subsequent trial, Grubbs obtained a verdict and judgment for $112, it being proved that $40 had been paid. Verdict and judgment for plaintiff.

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GULLY vs. GRUBBS.

Gully moved for a new trial. The court overruled his motion, to which he excepted. He also excepted to the opinion of the court granting a new trial to Grubbs. The motion for a new trial, by Gully, was based on supposed misinstructions by the court to the jury.

Defendant moved for new trial, and overruled. Exceptions.

In revising the case, three questions are presented to this court.

Questions to be decided.

1st. Could Grubbs maintain an action to recover the consideration for the sale of the land, without proving that the assumpsit was in writing; and when too, the assumpsit proved by him, was for a payment three years after the contract. In other words, does such a case come within the statute of frauds and perjuries?

2d. Is Grubbs estopped by the acknowledgement in his deed, from proving, by parol, that the $150 had not been paid, but remained due, notwithstanding the deed?

3d. Was it right to award to Grubbs, on his affidavit, a new trial?

When the contract of sale of land, is in writing, the consideration may be reserved by parol. The statute of frauds, does not apply.

On the 1st question, we have no doubt or difficulty. The statute of frauds and perjuries does not apply to such a case as the first branch of this question. The contract of sale was reduced to writing conformably to the statute. It was not necessary that the assumpsit for the price of the land should be in writing. This is not required to be written. Besides, the statute has not been construed to apply to executed contracts. Its expressions are "contracts for the sale of land," &c. Nor as to the other branch, can that part of the statute apply with effect, which provides, that no suit shall be brought on any contract which, by its terms, is not to be performed within one year from its date.

The statute does not vacate such a contract, or declare it to be void. The operation of the act is negative, not positive. It merely declares, that no suit shall be maintained to enforce such a contract. In such case, therefore, as this, a suit could not be prosecuted successfully, on the express contract. This is the only effect of the statute. The party is deprived of the advantage of enforcing his contract. But if the con-

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tract be executed on one side, and the case be one from which the law will, "*ex æquo et bono*," infer a contract on the other, a suit may be maintained on the implied assumpsit. See Roberts vs. Tennell, 3 Monroe, 247. In a suit on the implied promise, proof of the express contract may be admissible for some purposes, although it could not be used as the basis of the action. For instance, as in this case, to show that the suit was or was not brought prematurely. Because, although an action cannot be prosecuted on the express parol contract to pay, three years after date; yet on the implied assumpsit, suit should not be brought until after the expiration of the three years; and therefore, for this purpose, and others for instance, to show the amount to be less than that claimed and attempted to be recovered, it would be allowable to prove the express contract.

The action in this case, was well conceived, and was not interdicted by the statute of frauds.

On the 2d proposition, the authorities are not so satisfactory; and therefore, we have not been so clear as on the first. The authorities on this subject in England, as well as in the states of this Union, are various and contradictory. But we believe that the consistent doctrine and that which accords best with analogy, and with the practice and understanding of mankind, is that an acknowledgement in a deed, of the receipt of the consideration, is only *prima facie* evidence of payment. The acknowledgement is inserted, more for the purpose of showing the actual amount of consideration than its payment; and it is generally inserted in deeds of conveyance, whether the consideration has been paid, or only agreed to be paid. If the consideration has not been paid, such an acknowledgement in a deed would be intended to mean, that the specified amount had been assumed by note or otherwise.

An acknowledgement in a deed, of the receipt of the consideration is only *prima facie* evidence of the payment, and may be explained, or contradicted. So far, as a deed creates a right, or extinguishes a title, the parties are estopped by it; but so far as it merely asserts a fact, or evidences a fact, independent of the right, and unessential to the title, it is not conclusive of such fact.

An ordinary receipt is not conclusive evidence of the facts attested by it. A separate receipt for the price of land, would, it seems to us, be much stronger evidence that the money had been paid, than the customary acknowledgement in the deed of conveyance. At all events it should be as cogent. But it may be contradicted: why may not the other? An attention to

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GULLY vs. GRUBBS.

the principles on which parol testimony is admissible to explain or avoid the effect, or the apparent import of a writing, may reconcile many, if not all, of the authorities which seem to be in conflict. One of these principles is, that, as in certain classes of cases, the statute of frauds and perjuries requires writing to vest rights; it would be subversive of the policy of the statute, to allow parol testimony to change the legal import of the written evidence of a right adopted; to certify it, therefore, in all such cases, no inferior grade of testimony shall be admitted to supply or control the intrinsic meaning of the writing.

Another principle, and one more universal than the former, in its application, is that, wherever a right is vested, or created, or extinguished, by contract or otherwise, and writing is employed for that purpose, parol testimony is inadmissible, to alter or contradict the legal and common sense construction of the instrument. But that any writing, which neither by contract, the operation of law, nor otherwise, vests or passes, or extinguishes any right, but is only used as evidence of a *fact*, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus a will, a deed, or a covenant in writing, so far as they transfer or are intended to be evidences of rights, cannot be contradicted or opposed in their legal construction, by facts, "*ali undi.*" But receipts and other writings, which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation and liable to contradiction by witnesses.

A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no farther. A deed is not conclusive evidence of every thing which it may contain. For instance, it is not the only evidence of the date of its execution; nor is its omission of a consideration, conclusive evidence that none passed; nor is its acknowledgment of a particular consideration, an objection to other proof of other and consistent considerations.

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And by analogy the acknowledgement in a deed, that the consideration had been received, is not conclusive of the fact. *This is but a fact.* And testing it by the rationality of the rule which we have laid down, it may be explained or contradicted. It does not *necessarily* and undeniably prove the fact. It creates no right. It extinguishes none. A release cannot be contradicted or explained by parol, because it extinguishes a pre-existing right. But no receipt can have the effect of destroying, *per se*, any subsisting right. It is only *evidence* of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt, it is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguisher itself.

The acknowledgement of the payment of the consideration in a deed, is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment, in the deed, is generally merely formal. But if it be inserted for the purpose of attesting the fact of payment, (as it seldom, if ever, is in this country,) it is not better evidence than a sealed receipt on a separate paper would be; and, as we have already said, it seems to us that it would not be as good, for obvious reasons. The practice of inserting such acknowledgements in deeds, is very common, whether the consideration had been paid or not. "For and in consideration of $—— in hand paid," &c. is a common place phrase, which may be found in deeds generally. And it is seldom intended as evidence of payment, or for any other practical purpose, except to show the amount of consideration. To establish the conclusiveness of such loose expressions, therefore, might produce extensive injustice. If a note had been given for the consideration, and afterwards, without payment, a deed be executed for the land, with the common place phraseology in relation to the price, would this be conclusive evidence that the notes had been paid off and discharged? Surely not.

We concur, therefore, with those who have decided that the acknowledgement, on the deed, of the pay-

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BROWN vs. HUMPHREYS, &c.

ment of the consideration, is only *prima facie* evidence of the fact. This was the opinion of the circuit court.

As to the new trial, we have no doubt that there was ample cause to justify it. If any surprise will justify a new trial for a plaintiff, that made out by the affidavit in this case, is unquestionably sufficient. The opinions of the circuit court are all sustained by this opinion.

The affidavit of Grubbs, justifies a new trial.

There is, therefore, no error in the record; wherefore the judgment is affirmed.

Caperton and *Goodloe*, for plaintiff; *Turner*, for defendant.

CHANCERY.

Brown vs. Humphreys, &c.

Case 102.

Error to the Jessamine Circuit; W. L. KELLY, Judge.

Vendor. Vendee. Equitable lien for purchrse money. Publication. Non-resident. Appearance. Purchaser without notice.

May 5.

Judge ROBERTSON, delivered the opinion of the Court.

Compl'ts. bill.

THIS is a suit in chancery by Brown vs. Humphreys, Price and Crocket. Brown states in his bill, that on the 9th of December, 1819, he sold to Crocket a house and lot in Nicholasville, to which he held the equitable title, and for which he took Crocket's notes without any security; that on the 5th of April, 1821, he gave to Crocket an order for the title, on the holder of it, intending not to waive his equitable lien for the purchase money, which still remained unpaid; that on the 17th of April, 1821, Crocket assigned this order to Humphreys, who, shortly afterwards obtained a deed; that Humphreys held the property in pledge for a debt claimed by him from Crocket, and that the debt had been discharged sometime after the obtainment of the legal title; that in 1825, Crocket mortgaged the property to Price; and that Brown had obtained a judgment against Crocket for $1000, the balance due on the purchase, and issued an execution on it, which was returned "no property." On these allegations the bill prays a decree to subject the property to the payment of Brown's debt.

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The answer of Humphreys.

Humphreys, in his answer, denies that he held the legal title as a security for money, but says that Crocket owed him about $1600, and agreed to let him have the order for the title to the house and lot, in consideration of that debt, without any agreement as to price; that shortly after the order was drawn, Crocket stated that the house was worth more than $1600, and that if he (Humphreys) should keep it, he must pay him the difference between that sum and the real value; that he then agreed that Crocket might have the property again if he would pay the debt; that Crocket drew an order, in his favor, on John T. Mason, for the amount of the debt in iron, which he agreed to accept in discharge of the debt, if he should collect the amount of the order. But that he had never received more than two stoves on account of the order, and held Mason's certificate acknowledging that he had paid no more.

Bill taken for confessed against Crocket, as a non resident.

The bill is taken for confessed against Crocket, as a non-resident, on a certificate of publication. And the circuit court decreed a sale of the house and lot, to satisfy Brown's debt; from which Humphreys has prosecuted a writ of error.

Humphreys purchaser without notice.

It does not appear whether Humphreys had notice of Brown's equitable lien. On that ground, therefore, there could be no decree against Humphreys. There is no proof, however, that Crocket owed Humphreys, or if he did, how much; and the deed and order for the deed, could not be evidence against Brown. It is not stated that any price was agreed upon for the house and lot, between Crocket and Humphreys. The latter admits that he took the order on Mason. He does not state, that Mason did not owe the amount to Crocket; nor that he refused to accept the order; nor that he was unable to discharge it; nor that Crocket ever had any notice, during the lapse of several years, of the non-payment by Mason; nor is the value of the stoves mentioned, or accounted for.

Humphreys should look to Mason for his demand, if any, against Crocket having received

It would seem, therefore, that under all these circumstances, Humphreys and not Crocket or his creditors, should loose the amount of the order, if it still be unsatisfied. Mason may have been solvent when the order was drawn; he may now be insolvent. Crocket could not proceed against him whilst Humphreys held

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COCHRAN. vs. TATUM.

the order. He had reason to suppose that the order had been paid; and it is very evident that he did think so; therefore, either the house and lot or the amount of the order, (on this state of facts) should be liable in equity, to Crocket's debts.

the order, held it up for several years, without any proof of Mason's refusal or inability to pay, notice to Crocket, that the order was not paid.

Price admits the allegations of the bill, and insists on foreclosing his mortgage, unless Brown shall be entitled to precedence. Whether Brown or Price should be postponed, might depend, in some degree, on whether Price had any notice of Brown's equity. But Price does not seem to resist the prayer of Brown for relief.

The answer of Price.

The publication against Crocket, not sufficient.

There would be no objection, therefore, to the decree, except to its form, if Crocket had been regularly before the court. But the publication against Crocket was not quite two months before the appearance day. The order was published first, on the 26th day of May, 1826, and the first day of the next term was the 21st of July, 1826.

An appearance in the court of appeals, waives the necessity of advertising, when cause remanded.

If it be proper to sell the house and lot, Humphreys should be required by the decree, to release.

For want of sufficient publication, the decree is reversed and the cause remanded for new proceedings against Crocket, and as he has appeared in this court, a further order of publication against him will be unnecessary, and for such final decree as shall be just and equitable on the final hearing between all the parties.

Haggin, for the plaintiffs; *Hewett*, for defendant.

ASSUMPSIT.

Cochran vs. Tatum.

Case 103.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Indebitatus assumpsit. Work and labor. Consideration.

May 5.

Judge UNDERWOOD delivered the opinion of the Court.

Indebitatus assumpsit for work and labour, proved that part of the consider-

THE verdict in this case was clearly against evidence. The plaintiff below abandoned his special count and relied on his general count of *indebitatus assumpsit*, for work and labor. There was no inconsistency in the testimony. And it was clearly proved that the plaintiff was to be paid for his labor, not

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in money, but in a part of the crop raised. Under such proof he could not recover upon the general count, as settled in the former opinion of this court, in this case. The judgment of the circuit court is, therefore, reversed and set aside, and a new trial awarded for proceedings, *de novo*. The plaintiff must recover his costs.

COUCHMAN, &c. vs. BOYD.

ation, was to be paid in properly, pl'tff. cannot recover.

Turner, for plaintiff; *Caperton* and *Goodloe*, for defendant.

Couchmans vs. Boyd.

COVENANT.

Error to the Nicholas circuit; H. O. BROWN, Judge.

Case 104.

Covenant. Construction. Rule at law. Chancery. Specific execution.

Judge UNDERWOOD, delivered the opinion of the Court.

May 5.

BOYD executed his covenant to Andrew and William Couchman, for the conveyance of a house and lot, "the title to be made when the purchase money is all paid." The Couchmans were to pay $1000, Christmas, 1823, and $651 in March, 1825. All the purchase money having been paid and Boyd failing to convey, an action of covenant was instituted against him, to recover damages for his failure. On trial, the plaintiffs proved that they had paid the whole of the purchase money, but instead of paying it punctually, on the days fixed in the covenant, they had paid it to the sheriff afterwards, being coerced by law.

Statement of the pl'tffs. case.

The court instructed the jury to find as in case of a nonsuit. We think, from an examination of the evidence, the instruction ought not to have been given.

Instruction to the jury.

We have no doubt that the proper construction of Boyd's covenant, imposes a duty on him to convey the lot whenever the purchase money shall be all paid, whether before, at, or after the times fixed for payment in the covenant, and having failed to convey, he is liable. But it is contended that the plaintiff should have given Boyd personal notice of the payment of the money to the sheriff, before instituting their suit, and as this was not done, the instruction was proper. They were not required by law, to give such notice.

When covenant to convey land, upon the payment of the purchase money, a payment to the sheriff, gives a right to the conveyance, under failure of action

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CAPERTON, &c. vs. CALLISON, &c.

The sheriff was, by law, constituted Boyd's agent, to collect and receive the money, and he, in accordance with the principles settled in the case of Keys vs. Powell & Co. 2 Marshall, 253, was bound to take notice of the payment of the money to the sheriff.

without personal notice to covenantor.

The execution and tender of a deed, after the institution of the suit by Boyd, to the Couchmans, cannot defeat their action at law. If Boyd can bring himself under the operation of the principles recognized for the specific enforcement of contracts, he may have remedy in chancery, but common law tribunals cannot help him.

The tender of a deed, after suit, cannot affect the action at law.

The judgment of the circuit court is reversed, and the verdict of the jury set aside for new proceedings to be had, not inconsistent with this opinion. The plaintiffs must recover their costs.

Mills and *Depew*, for plaintiffs; *Crittenden* and *Triplett*, for defendants.

DEBT.

Caperton, Administrator of Karr vs. Callison, &c.

Case 105.

Error to the Madison Circuit; THOMAS M. HICKEY, Judge.

Powers of attorney. Pleadings. Practice. Distribution. Competent witness.

May 5.

Judge UNDERWOOD, delivered the opinion of the Court.

Nature of the case, pleadings, &c.

CAPERTON, as administrator of Karr, brought suit against Callison and Robert Donaldson, in the Madison circuit court, to recover the amount of a note executed by them to his intestate. Three pleas were plead, issues were formed on two of them, but as to the third plea, although regularly filed and unquestionably good, no notice seems to have been taken of it by the plaintiff. Verdict and judgment for the defendants.

Powers of attorney of every description, embrac-

A bill of exceptions filed by plaintiff, presents various questions for consideration. And first, is the execution of a power of attorney, not relating to the conveyance of lands, acknowledged before the clerk of the county court of a county, and recorded in the

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clerk's office, of the county where the business is to be transacted, upon the certificate of the clerk, before whom it was acknowledged, within eight months from the day of its date, sufficiently proved, by the certificates of the clerks, so as to admit it as evidence of the agent's authority? If the power had vested an authority to convey lands, we have no doubt that its execution would be sufficiently proved by being authenticated as above. And although the power in this instance, does not relate to land, we are of opinion, under the act of 1818, 2 Dig. 1049; its authentication will justify its being given in evidence as a recorded instrument. The terms of that act are so comprehensive as to embrace powers of attorney of every description, and we do not perceive any considerations of policy which would have influenced the Legislature to confine the operation of that act, to powers of attorney relating to lands. As the Legislature has not, by the language used, indicated any such intention, we should do violence to the letter of the law, and as we think, without reason, by confining it to powers of a particular description. We, therefore, extend its provisions to all powers of attorney, and when recorded in due time, shall allow their execution to be proved by the clerk's certificate, in the same manner that a deed of conveyance for lands may be proved. There was no error, therefore, in admitting the power of attorney as evidence.

CAPERTON, &c. vs. CALLISON, &c.

ed by the act of 1818, 2 Dig. 1049.

The court decided correctly in rejecting the testimony of James Karr. He, in right of his wife, was entitled to a distributive share of the estate of the plaintiff's intestate. He should not, therefore, be permitted to augment that estate, by his evidence in behalf of the administrator. It is true that the bill of exceptions shows that the administrator claimed the debt, in this case, as his own, and that he designed proving by James Karr, that such was the fact. But this, we apprehend, cannot render him competent. The administrator sued in his fiduciary character, and the court, before admitting the testimony of Karr, as competent, would have to determine that he could not assert his claim for his distributive share thereafter, against the administrator. Such a matter ought not to have been collaterally decided by the court, and

Disiributee of an estate, incompetent witness on behalf of adm'r. or ex'r. of such estate.

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Pugh's adm'r. &c. vs. Bell's adm'r.

if so decided, could not preclude Karr from asserting his claim, even if he were defeated in it when he might assert it. The administrator attempted to legitimate Karr's evidence by executing to him a release against all claim for costs. This release could not do it. If any release could have had the effect of making Karr competent, it would have been a release executed by him to the administrator, renouncing all claim to a distributive share.

It is not necessary to decide what effect has been produced by the failure of the plaintiff to notice one of the pleas of the defendant, because the finding for the defendant, on the other issue is good.

Error to give judgment against ex'r. or adm'r. pl'tff. suing *en autre droit.*

We know of no law which authorizes a judgment for costs against an administrator plaintiff, to be levied of the assets of the intestate, when he sues *en autre droit*, or for a cause of action accrued in the lifetime of his intestate. At common law, costs were not allowed in any case. We must look to statutory enactments for the law on this subject, and we have been unable to find any statute of England, Virginia or Kentucky, which authorizes such a judgment. As a judgment for costs has been rendered against the plaintiff, to be levied of the assets, it is error.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded, with directions to that court to render judgment on the verdict, in favor of the defendants, in relation to their debt, but without costs in their favor.

The plaintiff in error must recover his costs in this court.

Caperton, for plaintiff; *Turner* and *Breck*, for def't.

CHANCERY.

Pugh's heirs and executors vs. Bell's heirs.

Case 106.

Error to the Bourbon Circuit; JAMES CLARKE, Judge.

Specific performance. Statute of frauds and perjuries. Lapse of time. Resulting trust. Infancy. Limitation. Revivor.

May 6.

Judge ROBERTSON delivered the opinion of the Court.

Bill of Bell's heirs.

ON the 2d of May, 1817, the defendants, as the heir of Robert Bell, deceased, filed their bill in

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chancery, against Joseph Pugh, alleging in substance, that some time before 1789, (but at what particular time does not appear,) Rankin, Pugh and Bell, (their ancestor,) purchased from Holsey 330 acres of land, in the now county of Bourbon, which Holsey had bought from Hoy, and Hoy from Miller, the patentee, and of which a division was made among them by demarcation of boundaries, assigning to Rankin 130 acres, and to Pugh and Bell 100 acres each, for which each of them paid to Holsey the consideration, and on which each settled in 1789. That Rankin sold his interest in the said joint purchase to Shawan, who settled on the 130 acres, and who, or those claiming under him, enjoyed the possession ever since. That Bell made valuable improvements on his 100 acres, and died in 1791, in the undisturbed possession, leaving a widow and four infant children; (the defendants in error,) that before the death of Bell, to-wit, in 1789, finding that Holsey could make no title, Rankin, Pugh and Bell went to Hoy, in company with Holsey, and at his instance, to endeavor to obtain the title. That Hoy executed a bond for the conveyance to them, of the land, which was deposited with Pugh. That the division was then made, and the purchasers settled on the tracts respectively assigned to them. That the widow and children of Bell continued to reside on the 100 acres allotted to him, until 1802, when (she having in the mean time intermarried with Smith,) they all removed to the state of Tennessee, where the appellees resided during their minority. That Pugh had obtained a deed to himself, from Miller, the patentee; for his own and for Bell's 100 acres, had taken possession of, and occupied and wasted the land, and refused to convey to the appellees their father's 100 acres, or to account to them for its use and value. A conveyance of the legal title to the 100 acres, and rents and profits, are asked for by the bill.

Pugh's m'a. &c. vs. Bell's m'a.

Pugh, in his answer, admits the joint purchase, in substance; admits that he had obtained from Miller the legal title to two hundred acres, but insists on the statute of frauds and perjuries, alleging that the contract with Holsey was only verbal, and he says that after Bell's death and his widow's intermarriage, he ascertained that the legal title was in Miller, who

Pugh's answer.

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Pugh's ex'r's. &c. vs. Bell's h'rs.

claimed a small balance of about $165, as due to him from Hoy, and would not make a title until the payment of that sum. That Shawan agreed to pay $65, and he (Pugh) and Smith agreed to pay $50 each; whereupon Miller executed to Shawan a deed for his 130 acres; but as Smith could not get a deed without giving security for the $50, which he was to pay, he (Pugh) became his security, and took the deed in his own name, as an indemnity. He insists that the defendants in error had no right to any portion of the land; that it had belonged to Smith, in equity, and that he held Smith's bond for it, dated after the date of the said deed; and that the defendants having complained, that they were likely to be injured, he had paid them $40 each, in consideration of which, they had executed writings, binding them to release all claim to the land.

Proof in the cause.

The allegations of the bill, so far as they are material, are abundantly proved; in addition to which, it is proved that, at the date of the contract with the defendants in error, they were infants; that Smith had paid Miller the $50, but that Miller would not receive it until Smith acknowledged that he made the payment for the benefit of the infant children, and would hold the land in their right, and for them, Miller observing that "*the widow's and orphan's curse should never light on his head.*"

Revivor of the suit vs. Pugh's and Chiles' heirs.

Pugh having died after filing his answer, the suit, by regular revivor, was prosecuted against his heirs, one of whom (Mrs. Chiles,) having died, an order was made for reviving against her heirs.

Interlocutory and final decree

The court made an interlocutory decree for a conveyance to the defendants in error, of the land assigned to and occupied by their father, and for the assessment of rents and improvements. The commissioners assessed the rents from the time that Pugh took possession of the land, and allowed him, for his improvements, their value when made; and there being a balance in favor of the defendants, for excess of rent, over the estimate for improvements, a final decree ratified the report, and gave Pugh's heirs credit for the amount received by the defendants from Pugh.

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PUGH'S HR'S. &c. vs. BELL'S HR'S.

The assignment of errors.

The plaintiffs in error assign several errors to this decree, the chief of which are, that there is a defect of parties. That the lapse of time and the statute of frauds and perjuries, oppose an insurmountable barrier to a decree for the appellees, and that it was not proper to allow rents and profits. There are other objections urged, but they are so minute and unsubstantial, that it would be a waste of time to notice them.

The circumstances of this case, create a resulting trust. No limitation runs between *cestui que trust*, and the trustee.

We know of no principle of equity, nor of any authority, which could apply any limitation to this case. Whatever right Bell's heirs may have to relief, it is purely equitable, and results from an implied trust. The purchase of the land by Robert Bell; the payment of the price to his vendor; the execution of the bond to his use and for his benefit, and its deposit with Pugh, created, by implication of law, a trust between him and Pugh; and as soon as Pugh obtained the deed from the patentee to himself, a trust resulted in favor of Bell's heirs. 1 Atk. 59–385; 2 Ib. 75; 1 Pr. Wms. 780; 2 Mad. Ch'y. 96–7.

Such a trust will not result from a bare parol *agreement*, but there must be some palpable *act* done by the *cestui que trust*, on which to raise the implication. Such an act is the payment of money by himself, or by another to his use; and the first may be established by parol testimony. It must, however, be clearly proved. 2 Atk. 256; Ib. 71; 1 Pr. Wms. 607; 10 Vesey. 362–6; 3 Marshall, 24; Ib. 477.

No limitation will be applied to party, seeking relief against fraud, until after the fraud is fully discovered

In this case, not only are all the facts, necessary to create a trust satisfactorily proved, but they are admitted by Pugh, in his answer. It is true that he insists, that Smith paid a balance of $50, exacted by Miller, the patentee, and that thereby the right vested in Smith, for whom he held the deed, and from whom he afterwards purchased. But all this surely cannot change the case. Smith acquired no sort of right for himself; it was impossible that he could have done so. If he had attempted to do it, he would have been guilty of a most foul fraud, and his coadjutor, Pugh, would have been equally guilty, of a wicked attempt to despoil orphanage of its pittance. But Smith was not obnoxious to the imputation of fraud, in the first instance. It is abundantly proved that he made the

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PUGH'S HR'S. &c. vs. BELL'S HR'S.

payment of the $50, for the infants, and that Miller would not receive it, until this was acknowledged. The attempt afterwards, to sell to Pugh, is discreditable to Smith. Pugh knew that Smith had nothing to sell. His pretext for holding the title as an indemnity for the $50, for which he was Smith's security, and his attempt afterwards to hold it as a purchaser from Smith, are hardly reconcileable with both fairness and good sense. Besides, there is no evidence that Miller was entitled to any thing from Bell's heirs, or that a title could not have been obtained without any payment to him.

It would be difficult to find, or to suppose, a case of an implied trust, better established than this has been. And in addition to this, the whole case is tinged with fraud; almost every circumstance in it, exhibits the mark of a conspiracy against the rights of infants.

The equity of the defendants in error being thus so well ascertained, how was it barred by time? They were infants, and had been carried out of the state. Twenty years had not elapsed, from the origin of their right. The statute of limitations does not apply, nor will the chancellor apply it, by analogy, either to bar the right to the land, or to compensation for rents and profits. The profits are incidental, and if the principal right is not barred, that which is incidental to it, cannot be, in such a case as this, in which *cestui que trusts*, are the only parties complaining; and who seem to have been kept in ignorance of their rights, by Pugh and Smith, to whom they looked for information and advice, but who abused their confidence by endeavoring to deceive them.

It does not appear when all the defendants in error attained legal discretion. But it is probable that it was in 1810.

There is no limitation to a resulting trust; none will be applied (in equity) to fraud, until after it shall have been fully discovered. In this case there was fraud, on the rights of the defendants in error, and it was well disguised and long concealed, probably until a short time before this suit was brought. The equitable right to the land, therefore, was not barred by time, even if there had been no trust.

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Nor is the right to profits affected by lapse of time. The defendants in error could not have recovered rents before their right to the land was ascertained, and were not bound to sue for them while they were infants, nor until they were informed of the gross impositions which had been practised on their credulity and destitution. But if there were no other reasons for withholding the application, in equity, of the limitation at law, to a recovery of *mesne profits*, the subsistance of a resulting trust between the parties, would alone be sufficient for that purpose. As between trustee and *cestui que trust*, the limitation does not run either against the right to the land, or that to its incidental profits. It would be unreasonable to suppose that any of the rights subsisting in trust, could, between the parties to the trust, be barred by any statute of limitations at law, or by any analogy in equity to legal remedies, unless the right to the land is also barred. Whenever the *cestui que trust* can recover the land, he is, "*pari ratione*," entitled to its profits. Thus the trust in this case, would save the right of the defendants in error, to all the rents which accrued.

If right to land not barred, the claim to *mesne* profits not. The incident follows the principal.

But without even considering it as a technical trust, the right to the profits, during infancy, could not be barred by lapse of time. The rents accruing during minority, would not be barred, because infancy created a species of trust which will be protected by the chancellor. "In the instance of a bill by an infant, to have possession of an estate, and an account of rents and profits, the court will decree an account from the time the infant's title accrued; for every person who enters on the estate of an infant, is considered as entering as guardian or bailiff for the infant; and so says Littleton." 1 Mad. Ch'y. 73; Dormer vs. Fortescue, 3 Atkins, 130; Patrick vs. Woods, 3 Bibb, 30.

No limitation runs against an infant, when the right accrued to the infant.

In whatever aspect the case be received, therefore, the defendants in error have a just claim to rents from the time that Pugh took possession. We are at a loss to conjecture how the statute of frauds and perjuries can be applied to this case. This statute can have no application to resulting trusts. Besides, Bell had a bond for a title, and Pugh being its depository, obtained a deed, with full knowledge of the equity of Bell's

Statute of frauds, &c. does not apply to resulting trusts. Purchaser with notice of prior equity, will be compelled to re-.

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PUGH'S ADM'R. &c. vs. BELL'S HR'S.

heirs. And on this ground, if there were no resulting trust, the heirs would be entitled to a release of the legal title.

lease legal title.

Smith had no title to the land, either in his own right or that of his wife.

One who purchases with notice of a prior equity, not within the occupant law, nor entitled to compensation for his improvements, by the common or civil law.

As to the assessment of rents and improvements, there is some difficulty. The occupant acts do not apply to this question, in this case; nor can the equitable principle, adopted between a *bona fide* vendor and vendee, be the criterion between the parties here.

Pugh was not an innocent occupant, of land which he believed to be his own. He knew that he had no right to it in equity or conscience. His attempt to entrench himself behind a deed, improperly procured, and his subsequent purchase from Smith, and his contract with the defendants in error, while infants, (for the consideration of a trifle,) and from whom he must have withheld a knowledge of the nature and extent of their rights, are enough to deprive him of the equity of a *bona fide* possessor and improver. By the common law, he would not be entitled to compensation for improvements. By the civil law, if he improved in good faith, believing the land to be his own, he would be entitled only to so much as his improvements may have added to the value of the land; but if he were a trespasser, or knew that he was making improvements on land which, in conscience he ought not to hold, he would not be entitled to reimbursement for even any accession of value, by the expenditure of his labor or money.

Neither the common nor civil law, as such, can decide this question. The chancellor, however, leans to the equitable principles of the civilian. And, therefore, in the absence of any more direct authority, the civil law should be consulted and respected by courts of equity.

Rules for estimating rents and improvements according to the general principles of equity.

This case stands on the general principle of equity, and must be tested by them alone. By these, (without some reason for exception,) the occupant is responsible for rents and profits during occupancy, and is entitled to the value of improvements, estimated at the time of making them. But if the occupant had no notice of the complainant's title, or the complainant had

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negligently or fraudulently postponed the assertion of his right, rents would be computed only from the filing of the bill. 1 Maddock, 73–4; and in such case the real value of the improvements, at the same time, should be awarded, however much it may exceed the amount of the profits. We are aware that this last position is opposed by the case of Green vs. Biddle, 8 Wheaton, 1; in which the supreme court say that improvements beyond the rents, ought not to be allowed. It is believed that no cases to the same extent, can be found, except those in which the occupancy was *mala fide*. And, therefore, we would restrict this general doctrine in Wheaton, to cases *mala fide*. Such is this case evidently.

Pugh's heirs cannot object to being charged for rent on improvements made by their ancestor, because they are allowed pay for them at the cost when made. Ewing's heirs vs. Handley, 4 Litt. Repts. 374. If they should be bound to pay rent, only for the land as it was when his occupancy commenced, then they can ask for improvements, no more than the accession of value, if any, to the land estimated without them. This we are inclined to think, is the just rule between these parties. But we presume that its application will not benefit Pugh's heirs. As Pugh withheld the land improperly; as he was guilty of bad faith, and had full knowledge of the right of Bell's heirs, he should be responsible for all waste or deterioration; and for rents for the land estimated in their value, by the condition of the land when he took possession of it. He should be allowed nothing for improvements, unless they enhance the value of the land; and if they do, he should have no more than the accesion of such value. Such would be the rule of natural justice in such a case. Pugh, by his fraud or injustice, could not subject Bell's heirs to liability to him for any improvements on their land, made without their consent, and which had not increased the value of the land. For ameliorations, he might have claim. But even this, according to the civil law, would be very doubtful, under the circumstances of this case.

When land is withheld, under a full knowledge of a superior equity, the occupant is bound to account for waste and deterioration as well as rents and profits, and can only claim the enhanced value of the land as set off.

If, however, Pugh be considered as a trustee without fraud or bad faith, the rule established by the cir-

No person unless a-

cuit court would not be exceptionable. His heirs, therefore, cannot object to it, because it is more favorable to them, than that which must be applied, if this is not, and is the proper rule if their ancestor acted in good faith. The defendants in error have not objected to the decree for rents and improvements, therefore, it will not be reversed for the objections made by the plaintiffs in error.

grieved, can complain of a decree or judgment.

The alleged purchase from the defendants in error, is entitled to no consideration. They were infants; and if they had not been, the contract could not be enforced, because it was made with their trustee, for a greatly inadequate consideration, and must have been made without a knowledge by them of their rights.

The purchase of a trustee from *cestui que trust* will not be enforced in equity, when the consideration is inadequate, and the *cestui que trust*, was ignorant of the extent of his rights.

But one of Pugh's heirs (Mrs. Chiles,) died, "*pen dente lite*," and there is no evidence that the order of revivor was ever served on her heirs. There was no appearance for them by guardian or otherwise. This casual omission does not affect the equity of the case. Nevertheless, it was premature to render a final decree before these heirs were before the court, by a guardian, *ad litem*, if they were infants. But there is no evidence that they were infants, and the revivor is by consent. This is, therefore, no objection to the decree. It was not necessary to make Holsey or the heirs of Hoy, parties; nor was it necessary to make Smith and his wife parties. It does not even appear whether they are living.

When revivor by consent, decree not irregular, though no appearance, nor service of notice upon those against whom revived.

The decree of the circuit court must be affirmed with costs and damages.

Bibb, for plaintiffs; *Mills* and *Denny*, for defendants.

DEBT.

Ingraham vs. Arnold.

Case 107.

Error to the General Court; JOHN P. OLDHAM, Judge.

Abatement. Jurisdiction. Plea. Consideration. Affidavit.

May 6.

Judge ROBERTSON delivered the opinion of the Court.

IN this case various points are made, which it is not necessary to notice specifically.

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The pleas to the jurisdiction of the general court, whether considered as pleas in bar or in abatement, are not good. As the jurisdiction of the general court is special and limited, the declaration in a suit brought in that court, must aver all the facts which are necessary to give it jurisdiction. 3 Dallas, 382; 4 Ib. 7; 1 Cranch, 343; 2 Ib. 9–126; 4 Ib. 46.

General court, a court of limited jurisdiction and the declaration must contain such averments as will give the court jurisdiction.

The declaration in this case, contains all that is necessary to give jurisdiction. A demurrer could not, therefore, be sustained to it.

The plea that the note sued on did not belong to the plaintiff, is immaterial. The fact plead, if true, could not oust the court of its jurisdiction. There is no existing assignment of the note. The legal right is on the obligee, wherever, or in whomsoever the equity may be. And we suppose that the fact that the obligee is a non-resident of this state and a citizen of another, must affect, materially, the question of jurisdiction, and decide it in favor of the general court.

Suit on a note, must be in the name of obligee unless an existing assignment.

We need not decide whether it is necessary to make affidavit to pleas to the jurisdiction. If they be considered, technically, pleas in abatement, an affidavit would be necessary; otherwise it would not be. A statute of Anne required all "*dilatory pleas*" to be sworn to; hence pleas to the jurisdiction were included. This statute was never in force, nor ever re-enacted, in this state. The statute of Kentucky requires all pleas "*in abatement*" to be supported by affidavit.

The statute of Anne, uses the words, "dilatory pleas," that of Kentucky, pleas in abatement," when in giving affidavit.

The allegation that the note sued on, was by the law of Rhode Island, where it was executed, a parol contract, can have no effect. The *lex fori* and not the *lex loci contractus*, regulates the remedy and the evidence. Nor can the allegation that suit on the note was barred by time in Rhode Island, have any influence here.

The *lex fori*, not the *lex loci*, controls the remedy.

Number 2, a long plea, (to which a demurrer was sustained,) containing much that is irrelevant and immaterial, concludes by averring that "*the note was executed without any consideration.*" The object of the pleader seemed to be to present and to rely on the impertinent matter in the plea; and in this view we suppose the general court considered it. But the last

Plea which required to be sworn to, before filed, should be objected to; demurrer waives the oath.

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HARRIS vs. OGG.

averment presents a substantive defence, which, if true, is a bar to the action. The demurrer was erroneously sustained to this plea, because, although it ought to have been sworn to, the demurrer dispensed with the affidavit, and admitted the averments to be true. The filing of the plea ought to have been objected to.

Error to render judgment for interest upon a note, executed in another state, unless the rate of interest be found by a jury.

The court erred too, in rendering judgment without the verdict of a jury, for interest on proof of the rate of interest in Rhode Island. The rate of interest in a foreign state, or in any of the sister states of this confederacy, is a fact which, like all others, must be proved, and ascertained by a jury; and the court cannot give judgment for such interest without a finding of the amount by a jury. Litt. Sel. Ca. 507; 1 Monroe, 209.

The judgment of the general court must, therefore, be reversed, and the cause remanded, for a repleader to commence with the plea to the consideration.

Monroe, for plaintiff; *J. J. Marshall*, for defendant.

COVENANT.

Harris vs. Ogg.

Case 108.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Covenant. Declaration. Pleading. Damages. New trial.

May 6.

Judge UNDERWOOD delivered the opinion of the Court.

Pl'tffs. declaration, and the covenant of defendant.

THE defendant in error, brought an action of covenant against Harris, upon a contract, in which Harris acknowledged that he had received of Ogg, five hogsheads of tobacco, and promised "to freight them to New Orleans, barring unavoidable accidents, and *sell at the best possible price, at Orleans*, for which Harris was to receive one dollar per hundred, one half in commonwealth's money of Kentucky, and the other half at New Orleans, in good cash." The declaration avers that Harris safely freighted the tobacco to New Orleans, where it was inspected, and passed as first rate, and then assigns a breach in these words, "but said defendant has wholly neglected to

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sell the same at any price, *or to account to the plaintiff for said tobacco, or any part of it*, although ample time has intervened for him to have done the same."

Demurrer overruled.

The defendant filed a demurrer to the declaration, which was overruled.

Defendant filed two pleas, which were adjudged bad on demurrer, and verdict and judgment for plaintiff.

He then filed two pleas, the first averring, in the language of the covenant, that he did freight the five hogsheads of tobacco, received by him of the plaintiff, to New Orleans, and sold it at the best possible price at New Orleans, according to the form and effect of the covenant; and the second averring that the plaintiff had not kept and performed his part of the covenant, by paying to defendant, for freighting said five hogsheads of tobacco, one dollar per hundred, &c. as stipulated in the covenant. The plaintiff demurred to both pleas, and the court gave judgment on the demurrers, in his favor. The defendant failing to plead further, a writ of inquiry was awarded, and the jury assessed the damages at $166 67 1-2, for which the court gave judgment.

Proof in the cause.

The plaintiff proved that the defendant arrived with the tobacco in New Orleans, in the spring of 1822, and also proved the then selling price of tobacco at New Orleans, and that but few sales were made. He also introduced evidence of the expenses of inspection, &c. He proved that the defendant left New Orleans about the 15th of May, and did not sell the tobacco.

Instructions moved by defendant refused. The instructions given.

The defendant moved the court on this evidence, (which was all that was given) to instruct the jury that the value of the tobacco, when the defendant arrived with it at New Orleans, was not the criterion of damages. The court refused to give the instruction asked for, but instructed the jury, that the value of the tobacco, whilst the defendant remained in New Orleans, in the spring of 1822, after deducting the freight and expenses at New Orleans, was the proper criterion of damages, with interest, if the jury choose to give it. The defendant excepted to the instruction as given, and to the refusal of the court to instruct as required. And now all the questions which can arise upon the

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preceding statement, are brought before us by the assignment of errors. We will settle them in their order.

Covenant "to sell for the best price that can be obtained." Declaration must aver, that covenantor could have sold, and did not, or it is insufficient.

1st. The declaration is not good. It is defective in not averring that the defendant, on reaching New Orleans with the tobacco, was able to effect sales thereof, and did not, as required by the covenants; for if he could not sell at any price, he is not responsible for failing to sell. The defendant stipulated to sell at the best possible price. This is no guarantee, that the article should command a price in market, and if it could not be sold at any price, for want of purchasers, the covenant was not violated, in not selling. The covenant only means, that the defendant will sell at the best price which can be had, and if nothing can be had, if it is impossible to effect sales, owing to the condition of the market, or other cause, the defendant is not responsible for failing to sell. This doctrine has been recognized by this court, in the cases of Rogers vs. Boone, and Boone vs. Rogers, from the Warren circuit court, not yet reported. The statement, that ample time has intervened, for the defendant to have effected a sale, will not cure the defect. If the article had been in demand, but little time would be necessary to effect a sale, and no matter how much time is allowed, if the article will not sell for the want of purchasers, the granting of time will not create a responsibility.

A plea, in the language of a covenant to do, or to perform, averring the thing to have been done or performed, is good, and equivalent to covenants performed.

2d. The first plea was good. It traversed the only important breach assigned in the declaration, to-wit: the failure of the defendant to sell the tobacco. The plea, in the language of the covenant, averred that he did sell it, and thereby showed a performance of every thing, which he had stipulated to do. The court, no doubt, decided that the plea was bad, because it did not answer that part of the declaration, which avers that the defendant had failed to *account* for the tobacco, or any part of it. There being no stipulation in the contract to that effect, the averment was surplusage, and a departure from the contract, and was properly disregarded. Actions of covenant cannot be maintained, except on contracts reduced to writing.

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The import of the writing cannot be enlarged by averment in the declaration. In this case there is no duty imposed by the covenant on the defendant, but to take the tobacco to New Orleans, and to sell it. What was to be done with the money, if sales were effected, or what was to be done with the tobacco, if sales could not be effected, are not expressed in the covenant. We cannot imply a covenant to help out the plaintiff. No particular forms or expressions are necessary to constitute a covenant; any language which clearly shews the interest of parties, is sufficient, and there may be technical words used, from which the law, by implication, will raise a covenant. But where the covenant expresses with clearness, the contract of the parties, as far it goes, and may omit something which we may think was also intended by them, we cannot supply such omission. For if such things were to be supplied by the discretion of the judge, to make the contract complete, such discretion never could be controlled by fixed rules, applicable to the multifarious and complex transactions of men, and the danger of thwarting the real intentions of the parties, by arbitrary principles, would, at all times, be great, and in practice, might often be ruinous. We cannot, therefore, say that Harris's covenant in this case, bound him to pay over to Ogg, the money arising from the sale of the tobacco. Nor can we say how he was to dispose of the tobacco, if it could not be sold. It is expressly decided in the case of Wilcoxen and al. vs. Rix, that recovering property of another for sale, does not create an implied covenant, to pay over the money. See 1 Marshall, 421. The principles of that case are applicable to this. We have no doubt, that if Harris sold the tobacco, and received the money, the law would imply an assumpsit, to pay it over to Ogg, if there be no contract disposing of it otherwise. If such be the case, Ogg's remedy is plain, but different from that he has sought. He also has remedy, if Harris has converted or wrongfully disposed of the tobacco, but not in the form of action he selected to pursue.

No averment can enlarge the stipulations of a contract, or create a covenant by implication.

3d. The second plea is bad. It attempts to defeat the action by pleading the non-payment of the freight, as a precedent condition, to be performed by Ogg. There is no pretext for putting such a construction upon the covenant.

Second plea bad.

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The criterion of damages, the best price for which H. could have sold the tobacco of O., within a reasonable time after reaching New Orleans, expenses deducted.

4th. The instruction asked for by the defendant, did not exactly hit the law of the case, and that given by the court was erroneous. The criterion of damages was the best price which Harris could have got for Ogg's tobacco, within a reasonable time after his arrival with it at New Orleans, clear of the expenses of inspection, drayage, storage, and such other expenses as may be incidental and necessary to effect sales; in other words, the best possible price that the tobacco would bring, after deducting expenses incident to the sale. As Harris would be liable in assumpsit to Ogg, for the money he might get, it was his duty, under the covenant, to sell for the best price, and if he could get a price and did not, it was such a violation of his contract, as should render him liable for what he could have got, deducting the expenses aforesaid.

When reciprocal action for breach of covenant, there cannot be set-off. In what cases allowing interest discretionary with the jury.

The freight should not have been deducted. Harris has his remedy by action for that, if not voluntarily settled, and it cannot come in as a set off. It was also wrong to allow interest. Interest is given for withholding a debt due. In this case, the whole complaint of the declaration is, that Harris did not sell, whereby he might have created a debt to Ogg, by the reception of the money. If the declaration be true, no such debt was created. We have not known a case where the damages have been enhanced, by the addition of interest, for a failure to sell property, which a party as agent agrees to sell for another. Where one owes another property, and fails to pay it when due, whereby the claim is converted into a money demand, then it is discretionary with the jury, to give or refuse interest, and in such a case, the declaration shews the facts which, under the operation of law, makes it a demand for money, from the day the property was payable. The court, no doubt, acted on the idea that the present was an analogous case. Although there is a strong resemblance, yet we are not disposed to bring the present case, within the principles settled in cases for the non-payment of property. In an action of assumpsit for the money, we think interest might properly be allowed, had Harris sold and received the cash.

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5th. It results from the foregoing view, that the court erred in refusing a new trial, on the application of the defendant.

Wherefore, the judgment of the circuit court is reversed and set aside, and the cause remanded, with directions to grant a new trial; and to permit the plaintiff to amend his declaration, and the defendant to plead in conformity with this opinion. The plaintiff in error must recover his costs.

Goodloe and *Caperton*, for plaintiff; *Turner*, for defendant.

Thompson vs. Clay, &c.

CHANCERY.

Error to the Woodford Circuit; WILLIAM L. KELLY, Judge. Case 109.

Set off. Parties. Dismissal without prejudice. Practice. Parties. General rule.

Judge ROBERTSON delivered the opinion of the Court. May 7.

PORTER CLAY, as administrator with the will annexed, of Richard Young, deceased, in obedience to the will, and in pursuance, also, of an act of assembly, passed for that purpose, at his instance and that of the testator's heirs, sold and conveyed to Thompson, in 1816, a tract of land of the estate of the testator, containing 81 1-2 acres, for the price of $978. Half of this sum has been paid, and Clay assigned to William D. Young, a note on Thompson, for a moiety of the remainder, and obtained judgment on a note for the other moiety, in his own name, as administrator. Young also obtained a judgment on his note. Statement of facts in complainant's bill.

After the sale and conveyance to Thompson, Whitaker and Wilson sued Clay and Young's heirs, for a debt due to them from the testator; in which suit the heirs plead the said tract of land as estate descended to them. Judgment being rendered for the plaintiffs, their execution was levied on the land, and Thompson purchased it at the sale under the execution, for $286 6 1-4 cents, which sum was paid to the plaintiffs and endorsed as a credit on their execution.

To set off this $286 6 1-4 cents, against the judgments of Young and Clay against him, Thompson filed

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his bill in chancery, against them and the heirs of Richard Young.

Answers of Clay and Young and the infant heirs; adults not before the court. Bill dismissed.

Clay, W. D. Young and the infant heirs, by their guardian, *ad litem*, answered the bill and resisted the set off. The adult heirs are not regularly before the court.

The circuit court dismissed the bill and dissolved the injunction, which had been granted, with costs and damages.

To reverse this decree, this writ of error, with a *supersedeas* is prosecuted by Thompson.

T. purchased land from C. adm'r. with the will annexed of Y. the heirs of Y. being impleaded, they surrendered this land, as estate descended to satisfy a demand against their ancestor; the land was sold under an execution. T. purchased, and the execution vs. the estate of Y. was credited by the purchase money. C. attempts to coerce the original price stipulated to be paid by T. without giving him credit for the money paid upon the execution against the estate of Y. deceased T. has a right

We have no doubt that Thompson's bill contained sufficient equity to entitle him to relief. Although the sale of the land by the execution, was improper, and might have been prevented, still, as Thompson paid for the administrator and heirs, $286 6 1-4 cents, on an execution against them, they should refund it with interest. And as he saved the land from a vexatious incumbrance, by making the payment, he may, in equity, hold against the administrator and heirs, the rights which Whitaker and Wilson held, before the sale. 2 Atkins, 446; 1 Vernon, 37; 2 Vesey, 53; 1 Maddock, 498; lb. 505, and the authorities there cited; 4 Litt's. Repts. 250, Ellis vs. Browning. As he, therefore, paid the said sum to the use of the administrator and heirs, and to protect the land for which his notes were given, and on an execution levied on the land, as the estate of the heirs, and as it is not alleged that the assignment to W. D. Young was before this purchase, and it is inferable that it was not, Thompson has a right to a set off against the two judgments on his notes, to the extent of the price paid by him for the land, on execution. This, it would be more just perhaps, for the heirs to adjust. But that is a matter between them and the administrator. Thompson has a right to appeal to the administrator for justice; and having bought the land from him and executed his notes to him, it is peculiarly proper that he should look to him for his indemnity. He has a right to insist on a credit on his notes for the land.

But the heirs were necessary parties; and hence, as they were not all before the court, the bill might have been dismissed for that cause, without prejudice.

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The record, however, shows that the bill was dismissed on a hearing, on the merits. In this the court erred. If the proper parties had been before the court, the injunction ought to have been perpetuated. As there was a defect of parties, the court departed from the regular and approved practice, in hearing the cause on the merits. The proper course would have been, to enter a *nisi* rule, that unless, in a given time, the proper parties were made, the suit as to those who were parties, should be dismissed. Chiles vs. Allin's heirs, 2 Marshall, 351. If the court had thought proper to dismiss for want of proper parties, the dismission should not have been absolute as it was, but without prejudice. On any and all of these grounds, therefore, the decree is erroneous.

to a set off, of the sum credited, and interest.

But as the court might rightfully have dismissed without prejudice, for want of necessary parties, the question arises, whether in reversing the decree, this court shall direct the inferior court to dismiss without prejudice, or direct it to give leave to make the proper parties; or leave it free, without any instruction, to follow its own discretion?

This is an important question of practice. The modern practice established by the late judges of this court, has been, (when a bill has been erroneously dismissed absolutely, because the complainant had failed to make the necessary parties,) to reverse the decree and remand the case, with instructions to dismiss without prejudice. And the reason assigned for it is, that as the court had the right, either to offer leave to make the proper parties, or to dismiss without prejudice, for not having done so, and as it elected to dismiss, therefore, the appellate court will not control this election, but only correct the error committed, in making the dismission absolute, and instruct the circuit court to enter a decree of dismission without prejudice.

Bill might have been dismissed without prejudice for want of proper parties.

This reason is not perfectly satisfactory to us, and believing that a rule somewhat different from that settled by our predecessors, would be more rational, and generally more conducive to the ends of justice, we shall venture to establish one for ourselves. This we shall do with the less reluctance, as it is a matter of practice, in which no general or essential principle of law is involved.

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When a court dismisses a case absolutely, it generally does so on the merits; and does not exercise its discretion, either to give time to make parties, or for an omission to do so, or to dismiss without prejudice, when it does not dismiss for want of parties. And even if a court should dismiss absolutely, for want of parties, it certainly does not in this, make the prescribed election. It does neither of the things which it had the right to do. And, therefore, because it has not confined itself within the sphere of election, its decree will be reversed; and this is the only reason why it may be reversed.

We are unable, therefore, to see the force or application of the only reason assigned for the practice which we disapprove, and which we are about to modify.

When a decree is reversed for a defect of parties, the court below, having dismissed the bill "*absolutely*," instead of "*without prejudice*," the court and parties should be placed in the attitude in which they were, prior to pronouncing the erroneous decree. And the court should have power at their discretion, to give time to compl'nt. to cause the proper parties to be made or dismiss the bill without prejudice.

When a decree is reversed for a particular error, the cause, when remanded, should stand in the attitude precisely, which it occupied, before the erroneous decree was rendered. The inferior court must then proceed with it as it should have done before the error was committed. It should be allowed to do what it had a right to do before; that is, to make the specified election. Its decree was reversed only because it did not make that election. For dismissing absolutely was not within its discretion. When the decree is reversed for this error, the cause is opened and the court must make another decree. Should it not then, as a general rule, be free to make its election, for not doing which, its decree was reversed? Must this court compel it to dismiss the bill, because it erred in dismissing it absolutely, when it had no other right than that of dismissing without prejudice, or not dismissing until the complainant, after notice of the necessity of other parties, had failed to make them? It seems to this court, that the natural consequence of reversing a decree, for such an error is, that the inferior court shall only be prevented from falling into it again, by instructing it, that *when* it shall make another decree, if it shall be one of dismission, it shall not be absolute. And this is all that this court ought to do, without some peculiar motive for doing more. "*When you dismiss, do it without prejudice*," should be the language, as it is

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The court should not be required to dismiss without prejudice, but if, upon revision, they chose to dismiss, it must be without prejudice.

the natural result, of a reversal for an erroneous, absolute dismission. And this court should not say to the inferior judge, "because you have, without authority, dismissed a bill absolutely, therefore, you shall dismiss it, whether right or wrong, but your dismission must be without prejudice."

In nearly all the cases in which the circuit courts have decreed absolute dismissions of bills, they have done so, because they were of the opinion that the equity was for the defendants, and not because the complainants had not brought all the necessary parties before them. And the first notice they had of the defect of parties, was furnished by the reversals of their decrees. If they had perceived the defects before they decreed, perhaps the decrees would not have been made. It is probable that then they would have done, what they always ought to do, when they discover a want of proper parties; that is, notified the complainant of the defect, and given him time and leave to prepare his cause for a hearing on the merits. It is very difficult for the complainants in chancery suits, to foresee who will be necessary parties. And courts would act more in the spirit of chancellors, if they would never dismiss bills for want of parties, without giving complainants an opportunity to make such parties as the judges shall deem proper parties.

But when a circuit court dismisses a bill for a supposed lack of equity, without detecting any defect of parties, if this court, discovering the omission, shall direct a dismission without prejudice, the inferior court will be compelled to make a decree which, in all probability, it would not have made, if it had known the defect at the proper time, and which this court would not make, if it had original power to adjust the rights of the parties.

It would be much better to leave the chancellor unrestricted, excepting as to the error for which the case is remanded, and let him dispose of the case according to its exigencies, and the purposes of justice, as he had a right to do before. Let him be told only, that if he shall again elect to dismiss, he shall do it without prejudice. Or if the court instruct what to do, let him be instructed to do what, under all the circumstan-

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ces of the case, it would have done, if placed in his situation, and what it believes that he ought, in the first instance, to have done; and not compel him to persist in one error, barely because he has been corrected in another.

The most vigilant complainants cannot always know who are necessary parties. It is often a perplexing question for this court to determine; and it may, sometimes, be decided incorrectly. And so much delay is incident to the preparation and trial of chancery causes in this country, that if after a cause is brought to hearing in the inferior court, it shall be reversed here, and a decree dismissing the bill without prejudice, directed, it may frequently happen that intervenient circumstances, of time, or death, or insolvency, may deprive the complainant of all hope of success in another suit, however strong or just his clam may be, in conscience, to relief.

We cannot doubt, therefore, that as a general rule of practice, it would be best, when a decree is reversed for being an absolute dismission for defect of parties, to leave the court and the parties in possession of the rights which they had before the erroneous decree was pronounced.

Cases may occur which would render a modification of this rule reasonable and just. Where the complainant has a clear, equitable right, which it would be impossible, or difficult, or very inconvenient for him to assert successfully in a new suit, and where he has been guilty of no unreasonable negligence or delinquency in preparing his case, it might be proper to direct the inferior court to give him leave to make the necessary parties. And it would be peculiarly so, if the court dismissed erroneously, for some other cause than a defect of parties.

On the other hand, where a complainant has no right, or has perversely and for unjust advantage, (as is sometimes done,) intentionally omitted to make all the proper parties, it would be proper to instruct the circuit court to dismiss his suit without prejudice.

But generally, the cause should be remanded without any other instruction than that, if the chancellor,

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on reviewing it, shall choose to dismiss it, he shall do it without prejudice. This may prevent unjust delays and an expensive circuity and multiplication of suits, and will generally accord with and promote the end of all laws, cheap and speedy justice. But the court erred in dismissing this case on the merits, and seems not to have noticed any defect of parties.

Decree reversed, and directions to give time for proper parties to be made.

As, therefore, the decree must be reversed, the cause is remanded, with instructions to give to the complainant leave to bring all the heirs of Richard Young before the court; and when he shall have done so, to render such decree in his favor, and between the defendants as may be just, and shall accord with this opinion; but to dismiss the bill without prejudice, if the complainant shall fail, or unreasonably delay to make the requisite parties.

Denny, *Talbot* and *Sanders*, for plaintiff.

The following remonstrance against the rule of practice, established by the foregoing opinion, was prepared by Benjamin Mills, Esq. late one of the judges of the appellate court, and presented by the counsel for Young's administrator, as a petition for re-hearing.

Petition for a re-hearing.

The undersigned has noticed with some degree of pain, the decision of the court in this case, reversing the established doctrine and practice of the court, for upwards of thirty years, without a *single* case to the contrary. He is not concerned in this case, but will beg leave to offer his remarks thereon, as *amicus curiae*, from these motives.

1st. It will affect, materially, other cases pending, when, from the precedent here, the cases will be concluded, if a precedent on such a point *can* become conclusive, which is opposed to such a host on the opposite side.

2d. He feels well satisfied that the case may furnish a pretext to the vulgar and thoughtless, and the enemies of justice, to assert the "glorious uncertainty of the law," and before that, confidence in the stability of our institutions, which ought to be inspired and preserved.

It would seem to be inferred, from some expressions in the opinion, that the proper rule for the chancellor

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is, to notify the parties to the contest, of the absence of other parties; and at other times, it seems to be conceded that the chancellor is not bound to do so. Some of the the conclusions are drawn from the first assumption.

I hold it to be a clear and indisputable rule, that the parties may try at their peril, and that the chancellor may hear the case, between parties present, and "give his first notice by a positive decree, disposing of the bill, and thus shewing that more parties are wanting. Indeed it is laid down in the books, frequently, that the chancellor *may*, in *his discretion*, do so, and notify the parties by a decree *nisi*. If he has such *discretion*, it is not the subject of revision in this court. If it is, it is no longer discretion, but positive law. Indeed the position that the chancellor *may* notify the complainant, that he has not the necessary parties there, and direct him to bring them in, is one of very doubtful policy, and hardly consistent with the principles of justice, and were it *res nova*, I am convinced, would never be adopted in the American states, whatever might be the case in England, where the chancellors sometimes assume the prerogative of disposing with positive law, statutes not excepted. It is doing neither less nor more than turning the chancellor into a solicitor, to give advice to litigants, to nurse their cases well, and then to hear them after they are well prepared, to insure success; and what is still worse, it is always partial advice. It is given to complainants only, while defendants must do without it. To deal even handed justice, would it not be right to extend it to defendants, and to allow the chancellor to tell them that their answers are deficient for the most of certain allegations, or in not relying on certain points of defence, and finally, that such other additional proof would place their cause in a much better situation? Such a proceeding might shock us with the chancellor, but it is nothing more nor less than what is done in favor of the complainants, in instructing them *kindly* how to arrange their bills, to gain their causes. Indeed, the evils of it may be demonstrated in the case now reversed, one side, to-wit: the complainant is advised by high authority, that the cause is a good one; the precedents are cited to shew that the law is

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in his favor, and he is directed to shape his bill, which was once dead, but now brought to life, so as to succeed on the return of the cause. No such power was ever assumed by a court of common law. There the party, who comes without other necessary parties, must go out of court, without any amendment or instructions, and why? Because the law abhors the idea of a judge turning counsellor, for either one or both the parties. Unbiased, he ought to decide the case as brought before him, without telling either side how to prepare. The same reason ought to apply in equity, and the rule which allows the chancellor to act otherwise, is the offspring of illimitable power of English chancellors. It may be said it is too late to expunge the rule; but certainly it is not too late to refuse to extend it; and indeed to introduce it into the appellate court. I beg leave to protest against that tribunal becoming the advisers of one side only, in obedience to a rule of doubtful policy.

Another general observation may apply here. The rule which requires all parties concerned in interest to be brought before the court, is not itself inflexible, but may be accommodated to suit the convenince of the parties. In proof of this, I will refer to the case of Windell vs. Van Rensalear, 1 John. Ch'y. Rep., 349, and authorities there cited. The chancellor may consequently decide the merits sometimes without such parties, from reasons not known in the record, but omitted through careless preparation; and this court reversed, in a similar case, Crew vs. Callaghan, and 3 Litt. Rep. 365. If, therefore, the chancellor may decide the merits, when all proper parties are not there, and sometimes has done so, without sufficient reason, the only correction which ought to be applied, is to correct his decree, and not draw him back and order him to go again in a case where, from his own discretion, he is not bound to go at all.

If the chancellor does dismiss the bill absolutely, when he ought not to have done so, because the proper parties were not there, one of two presumptions arise from the record. The first is, that he mistook his duty so far as to decide on the merits, when the rules of equity forbade him to do so, for the want of proper parties. The second is, that he well understood his duty, and

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intended to direct the cause correctly, by dismissing the bill, without prejudice, and that in delivering his decree, *ore tenus*, he unintentionally omitted the words, "without prejudice," or spoke them, so that the clerk did not understand them; or that the words were delivered, but the clerk, hastily, or unskilfully, or by a *lapsus calami*, omitted to record them by a mere clerical misprision. The last of these presumptions above, was indulged, by not only the *late*, but the *former* judges of this court. The first is taken by the present judges. Now let the appeal be made, which is most decorous and respectful to the inferior courts, the ancient rule or the one now adopted? Which is the most consonant with the presumption against the acts of inferior tribunals, which the law prescribes? Certainly the latter. The revising court is *bound* to presume that the inferior tribunals have done right, until the contrary appears. And if error does appear, and it can be accounted for, by inadvertance, improvident acts or clerical mistakes, that mark, to account for it, must be taken, and it is due to the inferior courts, where business is transacted *originally*, often in haste, and sometimes in confusion. Applying this rule to cases like the present, and what is its operation? Why, simply this, the chancellor has gone right as far as he has gone, but there is an inadvertant omission or clerical mistake in leaving out the words "without prejudice."

Here I will note the distinction in cases of error in this court, between those decrees and judgments which have adjudged or decreed, what ought not to have been granted, and those which have given proper redress so far as they have went, but have stopped short, and not added something to make the remedy complete, and entirely conformable to the rules of law. In the first class, this court must reverse and direct what kind of judgment or decree ought to have been given. In the latter class, strictly, there ought to be no reversal. But a mere correction ought to be made by directing the deficit to be added. The act of Assembly supposes partial reversals and corrections. It is, therefore, absurd to say that the decree or judgment which is right, ought to be reversed, because it did not go far enough to come to the complete measure

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of right. It ought to be extended only, and that which is rightly done be permitted to stand. Many cases of this class might be particularized. An executor or administrator may be called to account by a legatee or distributee. The defendant may contest the right of recovery, and may add that if he is forced to pay over the estate in his hands, he requires bond and security to indemnify him against subsequently appearing debts, which bond has not been tendered. The cause progresses and the court decrees in favor of the complainant, on incontestible evidence of right, but omits to add the requisite, that bond and security shall be given before the payment is made, and the defendant appeals. What then is the proper course here? Certainly not to disturb that which has been rightly settled, but simply to direct the addition to the decree, that bond and security shall be given before the righteous and undisturbed decree shall be enforced.

An inferior court renders judgment against an executor or administrator, in his fiduciary character, for a money demand, but neglects to add, "to be levied of the goods and chattels which were of the testator or intestate, at the time of his death, and which have come to his hands to be administered." The proper correction here is not to disturb the judgment, and direct the cause to "stand in the attitude, *precisely*, which it occupied before the erroneous" judgment "was rendered," as is supposed in the opinion of which I complain, but barely to make the correction by adding the omitted clause.

Again, a plaintiff under the act of assembly, sues on a note engaging expressly, the payment of Commonwealth's paper, and makes his endorsement of a willingness to accept paper of the Bank of the Commonwealth, and the court below refuses to scale the demand, but renders judgment for the nominal amount, omitting the words, "to be discharged in paper of the Bank of the Commonwealth," which on its face would demand specie. In such cases it has never been the practice of the court to place the parties back, "in the same attitude precisely," in which they formerly stood, by disturbing what the court had rightfully done, *and*

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had the right to do; but invariably this court has directed the omitted words or clause to be added to the judgment.

So a decree may rightfully decree a sum of money, or correctly dismiss a bill, but stop short and fail to give the costs which ought to follow the decree. The proper course is to direct the costs to be added, leaving the first part unmolested. Cases of this kind might be multiplied to a tiresome length, but more is unnecessary. Precisely of this class is the case under consideration. The court below has done what it had a right to do, by law, and of course it has done right, and cannot be controlled; but it has barely omitted the phrase, "without prejudice." That simply ought to be added, instead of waking up the whole cause and giving to the plaintiff all the advantages which he could have had, if he had committed no error.

It is worthy of enquiry here, who has committed the error of a bill defective in parties, and who is allowed to take advantage of that error? Is it not the complainant? He prepared a defective bill; he caused his adversary to take issue on it; to adduce evidence; to employ counsel; to wade through a tedious litigation. He pressed the trial and demanded a decree on a bill, which entitled him to none. The chancellor dismissed his bill, but failed to add the expression, "without prejudice," or the clerk left them out. He sues out a writ of error; causes his adversary to travel through the litigation of this court; to employ new counsel. Over the head of his own error, or rather by the force of his own error, he reverses the decree; leaves his adversary to pay costs here, at least his own costs, and then returns to the court below, triumphant, by his own wrong, and loses nothing, but is possessed of every advantage that he would have been, if he had committed no error. Can this be right? Ought there to be no penalty on such conduct as this? Will the chancellor, who is characterized by *plain sailing* and *fair dealing*, permit this? It is conceived that this ought not so to be.

It will be easily seen that all this reasoning conflicts with the principles assumed in the opinion of the court. It is there taken for granted, that the error is not a

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mere inadvertence; not a clerical misprison; but the effect of the ignorance of the chancellor below; and what is more, it is supposed that if the chancellor below had discovered the error at the moment, he would have notified the party complainant, of the *want* of parties, and have given day to bring them in, instead of dismissing "without prejudice." This is conjecture only. The chancellor there *might* still have dismissed the bill, if the error had been pointed out, and can it be assumed that he *would* have acted otherwise? And can it be proper to reverse the decree and send it back, to try him, and see whether he *will* or *will not* dismiss? Surely for such a trial and such an experiment, which may still be fruitless; which may go before a different incumbent in office now; or may depend on the *feeling* of the present chancellor, no decree ought to be reversed, in favor of a man who has committed the error himself, of which he complains.

But what ought to be said with respect to authority. Surely no principle could produce so many precedents. If the law in that respect be not *settled*, what can ever *settle law?* I would rely, not only on the cases reported, which touch the subject, for they, although numerous indeed, are comparatively but few, compared with the numerous cases on record, not reported. Perhaps it would not be extravagant to say that more than twenty cases of a term, and at each term, has accrued, in which, conformable to the settled rule, there being, without any written opinion, entries made on record, correcting decrees by adding "without prejudice." Such was then the measure of justice which all knew and expected; now a different measure is granted, without any legislative act, from the same court, because there has been a change in the judges? Can there be an hour at which such a question can be put to rest? If there *can* be, the hour had come. If there cannot be, then the question is a nondescript, incapable of stability, but subject, like the perpetual motion, to a change every time there is a change of of judges. For surely the successors of the present members of the court, may go back to the old ground, fully justified, by the present judges assuming the new

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It seems to be assumed in the opinion, that the question is one of mere practice, made to govern the court, and not affecting the rights of the parties. With due deference, it is conceived that the rule is one which operates on and affects the rights of the parties. If it does not, it cannot be, in the language of the court, "an important question of practice." The court has named the delay of chancery suits in this country. Delay in chancery in every country, is justly complained of, and why? Simply because chancellors become the nursers of suits, by rules like the present. If they would act as common law judges, instead of advising parties how to proceed, the chancery docket would move as rapid, as the files of common law. Why has not the contrary rule at common law multiplied suits? It has never done so, and we may compare the chancery docket with those at common law, throughout the country, and the former is the greatest.

This decision, if it is to be published, will not only awaken the astonishment of legal characters, but revive a spirit of litigation. Many suits, from the number heretofore brought to this court, must have had decrees rendered of absolute dismission, when proper parties were wanted, and which were suffered to slumber, because, under the former rule, if the decree was corrected, lapse of time would settle the matter. But now they can, under the present decision, reinstate the same suit.

I observe that it is noticed in the opinion, that if a new suit is to be brought, the intervening circumstances of time or death, may preclude a recovery. This, to my mind, is a strong argument in favor of the new suit, and against the reinstatement. Why should the complainant, who alone has been guilty of error, in relying on a defective bill, be relieved from the consequences of time or death, more than the defendant? The death of witnesses for defendant, whose testimony would have settled the cause, with the proper parties then, may leave the defendant now, defenceless. See the great length of time during which a suit may slumber, or be dead, and yet be brought to life, without being compelled to acknowledge or count the chasm of time, or the hours of its death. The complainant may

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wait three years, then begin his writ of error, which may, and probably will, extend three more, and then have his suit reinstated, without suffering any inconvenience from this lapse of time. His old suit will be as good as ever, and not be injured by either time or death! Certainly this is allowing more than equity requires.

But the cutting off the rights of defendants, to rely on all this lapse of time, when it operates in *their* favor, is a strong argument against the rule now adopted. Why should they lose the time which has elapsed, without any pending contest, and without their fault? Indeed the consequences of such a decision may produce a serious result to the country. When the first day of January, 1816, drew near, the dockets of the country, especially those north of Kentucky, were crowded with landed controversies. The complainants frequently had defective titles, and other parties were necessary to make their titles good. Their bills are dismissed on the merits, and they now, under the new rule. may bring up their causes and reverse the decrees, and have their old suits reinstated, after the defendant's testimony is gone, and he himself is not allowed to plead the limitation of seven years, to real actions, although the time has really elapsed. For this reason, the present rule is objectionable.

But other perplexing questions follow this disturbance of the ancient rule. In the close of the opinion, it seems to be admitted that there may be cases, when it will be improper to do more here than to correct the dismission, and by adding "without prejudice." To classify such cases, gives me trouble, unnecessarily. If the bill was defective in equity, the former judges would give no relief by even adding, "without prejudice;" and this is supposed to be still the rule, because it cannot be right to redress a party who has sustained no injury, by losing a bill that entitled him to nothing. But suppose the bill to be good, and to state a case pregnant with equity; that it is controverted by the answer, which in turn, exhibits a case that shows that the plaintiff cannot recover; that the parties proceed to take their proof, and the result of all, is in favor of the defendant. But there is a defect of parties, and

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on final hearing, the court absolutely dismisses the bill. Would not this court reverse and send the cause back for new parties? Suppose the case was one attended with an injunction on a judgment at law, and on the final hearing, the injunction was dissolved and the bill dismissed, because there was no equity in the proof. If the decree is here reversed and the bill reinstated, with leave to make new parties, in the court below, what is the consequence? Why, a perpetuation for a time at least, of an injunction, and delay of justice in a case, when the complainant had no equity. Such must be the consequence under the present rule. It may be said that the court here might remedy this, by permitting so much of the decree as dissolves the injunction to stand, and only reversing that part which dismisses the bill. It may as well be said, that the decree dismissing the bill might be let to stand also, and only the addition put to it "without prejudice." There is as much room for one as the other, for if the chancellor below had been disposed to render a decree *nisi*, dismissing, unless the proper parties were made, he might not have dissolved the injunction, and it is uncertain whether he would or not.

Or will the court only apply the rule to a case when not only the *bill*, but the *proof* shows equity? This was not the former rule. The court formerly acted on the face of the bill only. If that contained equity, the dismission was corrected by adding "without prejudice," and this is certainly correct. For as the chancellor below heard the case prematurely, when the proper parties were not there, it follows, that the complainant had not closed his proof, and that if he had, on the introduction of new parties, he would have a right to introduce more. If then, the circumstance of there being equity on the face of the bill, requires the present rule to be applied, it follows that parties, with pliable consciences, who can place a plenty of equity on the face of their bills, without any existing in fact, can, under the present opinion, protract litigation to an intolerable and burdensome length, without any justice or equity actually existing in their favor.

This remonstrant could add more to what he has said, but he fears he may already tire, by too much,

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It is with the highest respect for and deference to the tribunal, which he addresses, that he presents these views on this subject. MILLS.

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As counsel for Young's administrator, and for the reasons within suggested, by Mr. Mills, I venture, respectfully, to solicit a re-hearing on their case. CRITTENDEN.

Petition for a re-hearing.

To this remonstrance and petition, the court, by judge Robertson, delivered the response, as follows:

The court feels no disposition to dismiss the subject of the petition; as a rule of practice, it has been settled for ourselves, or rather the old rule has been unsettled. We do not mean to re-establish it. In changing it, we felt and still feel sure, that we neither meant, nor manifested irreverence to what is venerable; and we felt and yet feel, not the slightest apprehension, that we violated any principle of equity, or rule of either legal or moral right, or that any consequences of hardship or injustice, will or can result from our act.

Response of judge Robertson to the petition for a re-hearing.

The practice which we have discontinued, was *unreasonable.* It was, so far as we know, peculiar to this state. It could not promote the ends of justice; it might, and frequently would produce glaring injustice, and irreparable injury without any reason for it.

The rule was old, but its antiquity alone, does not commend it. It is not sacred and inviolable, merely because it is ancient. Error, is not less error, because it has become gray with age. Time which makes it venerable, renders it the more alarming and mischievous. No right, which had been affected by the old rule of practice, can be so changed or touched by its abrogation. The petition, misconceives the effect of our opinion. We would only leave the chancellor, (as a general rule) free to exercise his discretion. In some cases, as our opinion indicates, the old rule would be enforced. We only mean, that there should be *no arbitrary and inflexible rule on the subject.* We feel no inclination to enlarge on the reasons suggested in the opinion. They seem to us, so plain and striking, as not to require any new illustrations. A defendant in chancery, cannot complain, that a decree in his favor,

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was improperly rendered, absolute, for want of parties merely, when it is reversed, as he knew it must be, the case shall be remanded, to stand as it did, before it was dismissed. The delay, which a defect of parties may have occasioned, is generally to his advantage; and it has resulted, as much from his fault, as that of the complainant. If he desired despatch, and nothing but fair play, why did he not demur to the bill, if the defect of parties appeared on its face, or plead in abatement, if it did not? When he has no equity or right to sustain him, and has no resource, except the perplexities, and uncertainties of pleading, from which he can derive any hope of frustrating or postponing justice, why shall he be permitted to lie in wait and be protected from just claims, by an error which he has contributed to produce? We stated that it would generally be prudent, for the chancellor to see that proper parties are before the court, or that the complainant, shall be advised, who are deemed necessary parties by the court, when the defendant lies by, and does not object, that there is any want of parties, and we did not suppose, that it was necessary to do more, than to cite the authority of this court, in the case, in 2 Marshall. In that opinion, written by judge Mills, the following language is used, "*and then the chancellor will frequently, in his discretion, render a decree, nisi, that unless the necessary parties, are brought before the court, on or before a day given, the bill shall be dismissed without prejudice, &c.*"

As the petition seems to consider this doctrine novel, and pregnant with mischief, it may not be amiss to refer to some other authorities. 2 Maddock, 141; after remarking, that the defendant ought to object to a want of parties by demurrer or plea, says, (*when the defect is discovered at the hearing*) "in such case, the bill is not dismissed; but the cause will be ordered to stand over; the usual order being, to "let the cause stand over, with liberty for the plaintiff to amend the bill by adding parties." "Where it appeared on an appeal, from a decree at the rolls, that parties were wanting, Lord Thurlow, ordered the cause to stand over, with liberty to the plaintiff, to file a supplemental bill, merely to add parties."

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Quotations could be multiplied from British Reports, ancient and modern, and from American Reports, to shew, that it is proper to give time to bring the necessary parties before the court, whenever they are seen necessary, either by the complainant or by the court. The reasons of the practice, is to do final justice, and prevent unnecessary expense, and multiplication of suits. As however, we do not intend to argue the question, we will forbear. The chancellor will not however be controlled in his discretion, to give leave or not.

The abolition of the rule, followed by our predecessors, instead of encouraging litigation, will curtail it evidently, so far as it may have any practical effect; and it will tend to prevent *legal fraud* and *judicial smuggling*.

If a pernicious practice has been tolerated "*thirty years*," the reason is the stronger, why it should be now discontinued. It has operated long enough; "*malus usus abolendus est.*"

Bain vs. Evans.

COVENANT.

Error to the KNOX Circuit; JOSEPH EVE, Judge.

Case 110

Cancelment. Assumpsit. Plea. Writ of inquiry.

Judge ROBERTSON, delivered the opinion of the Court.

May 8.

IN an action of covenant, brought by Evans against Bain, for $300 covenanted to be paid in horses or a wagon, the defendant, after a demurrer to the declaration, (which is substantially good) was overruled, filed two special pleas, each averring that before the day of payment, the defendant (Bain) paid the plaintiff (Evans) $247 50 in horses, and agreed to pay him in a specified manner, the remainder of the $300, which was $52 50, which Evans accepted in discharge of the covenant; and shall thereupon, in consideration of said payment and assumpsit, "*the covenant was cancelled and delivered up to the defendant.*"

Statement of pl'tffs. action, and def'ts. pleas.

A demurrer to these pleas being sustained, a writ of inquiry was awarded, and a verdict and judgment was rendered against the defendant for $300 in damages; to reverse which this writ of error is prosecuted.

Demurrer to pleas sustained, and writ of inquiry.

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ROYAL'S ADM'X. &c. vs. BRYAN.

The pleas show a good bar to the action. If, as stated, the covenant was cancelled and surrendered, no suit could be maintained on it. The pleas are not, as they seemed to be to the circuit court, simply pleas of a parol accord *in* satisfaction. This they would have been without the averment of the cancelment and surrender of the covenant. But this averment renders them an effectual bar. It is not that the covenant *was to be*, but that it *was*, cancelled and surrendered.

Plea that a covenant sued on, was satisfied & cancelled, tho' the satisfaction may have been by parol, yet it is a good bar, as no action could be maintained upon a cancelled instrument.

It is probable, from the fact, that Evans exhibited the covenant in his declaration, that this averment is false, and cannot be established by proof. But the demurrer admits its truth, and judicially, we cannot presume to the contrary.

The judgment on the demurrer was, therefore, erroneous, wherefore, the judgment in this case must be reversed, and the cause remanded for an issue to be taken on the pleas.

Triplett and *E. Smith*, for plaintiff; *Cunningham*, for defendant.

ASSUMPSIT.

Royal's Administratrix & Heirs vs. Bryan.

Case 111.

Error to the Fayette Circuit; THOMAS M. HICKEY, Judge.

Assumpsit for board. Statute of 1663.

June 9.

Judge ROBERTSON delivered the opinion of the Court.

Statement of the pl'tffs cause of action.

THIS is an action of assumpsit by Bryan, against the administratrix and heirs of Thomas Royal, deceased, on a long account, one item of which is a charge for boarding the intestate, his wife and servant, nine months.

Proof in the case.

The proof is, that Mrs. Royal, the administratrix, is the daughter of the plaintiff; that, being in delicate health, she and her husband came to his (the plaintiff's house) and lived in the family until Thomas Royal's death; that they brought with them, their household furniture and a negro boy; that Mrs. Royal, (there being no other white female in the family,) superintended the household, and that the negro boy rendered services in the family; that not long before Thomas

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Royal's death, he applied to the son of the plaintiff, (who kept his books,) for a settlement of his account, at which time there was no charge in the account for board, the son never having heard that there was to be a charge, but that he stated then to the son, that "*he was to pay for his board.* This was all the evidence of any contract for board.

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The jury found a verdict for the whole account for boarding the husband, wife and servant, for nine months, a portion of which, as charged, is subsequent to the date of the writ.

Verdict of the jury, &c.

The only question which it is material to decide (and which is presented by motions for instructions and for a new trial) is, whether the evidence justifies the verdict and the judgment of the court upon it, for the board?

We know nothing of the circumstances of the parties, and therefore, can say nothing of the morality of the charge for board. Without some peculiar reason for it, such mercenary hospitality to a sick daughter and her husband, would be unnatural, and to the honor of the paternal sympathies and regards of our countrymen, has been exceedingly unusual. But the jury, in this case, having found a verdict for the entire charge, it is to be inferred, that they had a knowledge of facts which induced them to consider the account reasonable and just.

But without the declaration of Thomas Royal, when he proposed to pay for *his* board, the evidence would surely not have authorized a verdict. The law will not imply a contract to pay for board. Such implication would do violence to the other circumstances in the proof in this case, and is forbidden by positive law. Nor could this admission by T. Royal, when construed most rigidly against him, justify a verdict for more than his own board. The declaration goes no farther, and a more extensive operation cannot be given to it, without distorting the other facts in the case, or entirely disregarding them. The verdict, therefore, should have gone no farther.

The law will not imply a contract to pay for board Admission by husband that he was "to pay for his board," authorizes the jury to infer that he had made a contract to that effect, but does not bind him to pay for the board of his wife & servant. The

It is insisted by the counsel for the plaintiff in error, that the acknowledgement of T. Royal, does not sus-

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tain the finding, even for the value of his individual board; and they rely on a statute of the colonial legislature of Virginia, in 1663. 2 Littell's laws, 583, in the following words: "Be it enacted, that no person *not making a positive agreement* with any one he shall entertain into his house for diet or storage, shall recover any thing against any one so entertained, or against his estate, but that every one shall be reputed to entertain those of courtesy with whom they make *not a certain agreement.*" We are not aware of any abrogation of this statute by legislative authority, or by disuetude in Virginia or Kentucky. Consequently it must be recognized, as we believe it has been, as in full force.

act of Virginia, of 1663, 2 Litt. laws, 583, in force. That act does not require there shall be special agreement, as to the price to be paid for board: but a positive contract to pay.

The acknowledgement of T. Royal, that he was to pay for his board, is not proof of a direct, express or positive agreement to pay a specified amount. And such acknowledgement, under the circumstances attending it, might reasonably receive different constructions. It might be interpreted either as evidence of an intention or wish on his part without any other than a supposed honorary obligation to pay for his board, or of a contract to pay either the customary amount, or whatever the board might be worth. And although, giving due effect to all the facts of the case, we should incline to give to the acknowledgement the first construction; the jury was allowed, by the nature of the evidence, to give to it the last. They might infer that a contract had been made, and that the contract was for the payment of a reasonable or the customary price. If he had possitively agreed with Bryan to pay him the usual price for his board, such agreement would be sufficient to bind him, under the act of 1663. For that act does not require, by its letter or its object, that there shall be a special agreement to pay a certain sum, or in any given mode. It only requires that there shall be a positive or express contract to pay. And an agreement to pay what the board may be worth, or what is customary, would be as much a positive or express contract, as it would be if a particular sum should be stipulated. If a contract for a certain amount should be required, still a promise to pay the common price, would virtually be such a contract; "*Id certum est, quod certum reddi potest.*"

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As the jury might have deduced from the declaration of T. Royal, a promise to pay for his board, the usual price, this court would not control their verdict to that extent, although the weight of probabilities might be opposed to the finding.

Verdict, in part, against law and evidence: a new trial must be granted.

But as they have found damages for the non-payment for the board of Mrs. Royal and the servant, not only without but against the evidence and the law, the verdict cannot be sustained.

The amount found, also seems to include some time after the institution of the suit. This is certainly wrong. But we suppose it probable that this anomaly is produced by some mistake in dating the year of the board, in the account. As the cause must, for the other objection, be reversed, it is not necessary that we should say more on this, than to refer to it and state that if there be no mistake in the date of the account, the verdict and judgment should have excluded the time subsequent to the date of the writ, and all time posterior to the death of T. Royal.

Judgment reversed, and cause remanded for a new trial.

Haggin and *Combs*, for plaintiffs; *Chinn*, for defendant.

Evans vs. Hardwick's heirs.

DEBT.

Error to the Fayette Circuit; GEORGE SHANNON, Judge. Case 112.

Appeal bond. Condition. Declaration. Nul tiel record. Variance. Identity.

Judge ROBERTSON, delivered the opinion of the Court. June 9.

Statement of the case.

A JUDGMENT in ejectment having been rendered against John Hardwick's heirs, on the demise of John and Samuel Ashley, commissioners appointed for that purpose, valued the improvements at $191 45 1-2 cents, for which the Ashleys refusing to execute bond, judgment was entered up against them by the court.

From this judgment they appealed, and the present plaintiff in error, Evans, was their security in the ap-

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EVANS vs. HARDWICK'S HEIRS.

peal bond. The condition of the bond was for the due prosecution of the appeal, and for payment of all costs and damages which might result from an affirmance of the judgment, or a dismission of the appeal, reciting the judgment as one rendered on the award of arbitrators. The bond was made payable "*to the heirs of John Hardwick.*"

The appeal was dismissed by the court of appeals with costs and damages. And thereupon, this suit was brought on the appeal bond, against Evans, (the security,) by several persons styling themselves the heirs of Hardwick, charging for breaches: 1st. The non-payment of the damages and costs; and, 2d. The non-payment of the amount of the original judgment, which had been appealed from.

A demurrer to the 2d breach was overruled, and issues of covenants performed, and of "*nul tiel record,*" were made up, on which, the court having decided that there was such record as that recited, the jury found a verdict and the court rendered judgment for the aggregate of the original judgment, the costs and the damages. To reverse which, this writ af error is prosecuted.

The questions for decision.

Three questions arise out of the record. 1st. Was the proof sufficient to sustain the right of the plaintiffs below, to sue as Hardwick's heirs? 2d. Was the decision on the plea of "*nul tiel record,*" correct? 3d. Did the 2d breach authorize a recovery of the amount of the original judgment?

An appeal bond, payable "to the heirs of H." the heirs of H. embracing the husbands of his daughters, may maintain an action, jointly, in their proper names, styling themselves the heirs of H. for breach of condition of the bond.

These questions will all be answered in the affirmative.

All the heirs of Hardwick were plaintiffs, and the husbands of his daughters were also plaintiffs; the declaration styling them the whole "heirs of John Hardwick." We see no sensible objection to this. The bond is to the heirs. The suit should be brought in the name of the heirs and according to the legal construction and effect of the bond. For this purpose the children of Hardwick, and the husbands of the daughters are the heirs and the obligees. Consequently, the joinder of the husbands with their wives, and the denomination of them all as the heirs of Hardwick, were proper.

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The objection made to the identity of the record is, that the declaration describes it as a record of a judgment on the award of arbitrators, and that exhibited is one of a judgment on the report of commissioners. This we consider an immaterial variance. There is enough in the record to identify the judgments proved and declared on. Besides, the judgment is described in the declaration, as it is in the appeal bond. This was proper. It could not have been otherwise. Consequently, if there had been a material variance, the defendants below could not take advantage of it, because the appeal bond would show on what case it was given.

If a declaration describe a judgment as it is in appeal bond, sued on, it is sufficient.

As to the 3d and last question, the case of Moore vs. Gorin, 2 Litt. 186, seems to be decisive. The condition of the bond for which the 2d breach is assigned, is substantially that, given by the act of assembly. It was certainly the intention of the legislature to secure the debt as well as costs and damages, by requiring an appeal bond with security. Such will be the effect of such a bond, conditioned simply for "*the due prosecution of the appeal.*" And such is the decision in the case 2 Littell.

Appeal bond, conditioned for "the due prosecution of appeal," binds the obligors, upon breach, to pay debt, damages and costs.

The judgment of the circuit court is, therefore, affirmed, with costs and damages.

Crittenden, for plaintiff; *Hanson*, for defendants.

Hancock vs. Ship.

CASE.

Appeal from the Franklin Circuit; HENRY DAVIDGE, Judge. Case 113.

Warranty. Fraud. Action on the case. Trustee. Cestui que trust. Purchaser. Sale. Title.

Judge ROBERTSON delivered the opinion of the Court. June 9.

HANCOCK sold a negro girl to Ship, for $300, and by a bill of sale, warrantied the title. Ship retained the undisturbed possession of the slave, until her death. He then brought an action on the case, for a fraudulent warranty, and obtained judgment for $276 in damages. During the progress of the trial, and after the verdict, various questions arose, which

Statement of the case.

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HANCOCK vs. SHIP

are reserved on the record for our revisal, but it will not be necessary to notice them all.

The objection made to Hancock's title is, that the girl belonged to Warrage and wife, as *cestui que trusts*, under a deed of trust, executed by her father, the original owner.

Facts proved in the cause.

The proof is, that the girl was loaned to Warrage, in May, 1817, and remained in his possession, in Virginia, until the 17th December, 1822, when the deed of trust was executed; and continued in his possession until some time in 1823, when he and his wife, with the assent and concurrence of the trustee, for a full consideration, sold her to the plaintiff in error, for the purpose of raising funds to enable them (Warrage and wife) to remove to Kentucky. That part of the price of the girl, was appropriated to this object, and the remainder expended in the purchase of land, in Kentucky, which was secured to them in trust, as the girl had been. That Hancock took possessession of the girl, when he bought her, brought her to Kentucky, and shortly afterwards sold her to Ship.

We shall not decide whether Ship could maintain an action, for the breach of warranty of title, after the death of the negro, having retained possession of her without interference. Nor whether, if he could maintain such action, he should be restricted to the actual injury, or might recover the whole consideration; nor whether more than five years actual and continued possession by Warrage, in Virginia, before the date of the deed of trust, vested the title in him, so far as his creditors or subsequent purchasers from him, might be interested. There is one fact in the cause which is decisive.

Sales of a negro, by *cestui que trust*, with the approbation & consent of trustee, vests an absolute title in the purchaser.

The sale by Warrage and wife, with the approbation of the grantor, and the trustee, vested the whole right in the purchaser. The trustee held the legal right; the *cestui que trusts* held the equity; both were concentrated by the sale, in Hancock. A sale by the trustee alone, would have vested the legal right. And we doubt whether a court of chancery would listen to an application of Warrage and wife, to establish their equitable claim against a remote purchaser,

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without notice of their right, and especially after they had accepted another trust, the product of the sale by their trustee. Indeed we feel very sure, that such a claim could not fail to be discountenanced.

But when Warrage and wife, not only enjoyed the benefit of the sale, made of the legal title, but expressly parted with all their right to the purchaser, what semblance of right have they now? If the trust had been for the separate use of the wife, she alone was competent to dispose of it. If, as in this case, the trust enured to the joint use of husband and wife, surely they were both able to sell it to another. If, therefore, the title must be traced to the deed of trust, and did not exist before its date, and independently of it, a complete title is proved to have been transferred to Hancock: and consequently, even if Ship, by his purchase, stood in no better attitude than Hancock did, he was never in the remotest danger of being supplanted by Warrage and wife, or their trustee, or any other person claiming by the deed of trust. Without establishing the validity and effective operation of the deed of trust, he could have no pretext of objection to the title which he had acquired. If he had succeeded in shewing that the title was derived from the deed of trust, and that alone, he had thereby entrenched himself behind a rampart, which would secure him from all danger. By establishing the efficiency of the trust, he would indubitably establish his own right. Whatever may be thought of the deed of trust, therefore, the plaintiff below has shown, with the co-operation of the defendant there, but plaintiff here, that he held a clear and indisputable title to the negro girl. If he look to the deed of trust, we cannot imagine a better title than that derived to him, from the sale by the trustee, and the beneficial parties to his vendor. The deed out of the question, his title is unquestionable. Moreover no suit had been brought against him, and he was in danger of none. It could not have jeoparded his right, if it had been brought, provided he had defended it in good faith, and in earnest.

The verdict and judgment, therefore, on this ground if there were no other, are erroneous.

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The objection to the declaration is not valid. Although a written warranty be given, an action on the case may be sustained for fraud in the warranty. Such suits are not unusual. They are sustained by authority, and by principle and analogy. For the simple warranty suit must be brought "*ex contractu*," and of course must be covenant, if the warranty be in writing. But whether it be written or parol, suit for a fraud in making it, should be case, "*ex delicto*."

Fraud alleged in a warranty. Remedy, action in the case, whether warranty written or by parol.

But for the reasons before assigned, the judgment of the circuit court is reversed, and the cause remanded, with instructions to set aside the verdict and grant a new trial.

Talbot and *Monroe*, for appellant; *Crittenden* and *Triplett*, for appellee.

CHANCERY.

Forbes's heirs vs. Mitchell and Brents.

Case 114.

Error to the Green circuit; BENJAMIN MONROE, Judge.

Statutory guardian. Prochein ami. Rule for settlement between guardian and ward. Powers of guardian to commute debts or judgments due to ward. Responsibility of guardian. Interest.

June 9.

Judge UNDERWOOD, delivered the opinion of the Court.

AT the February term, of the Green circuit court, 1820, the plaintiff in error recovered a judgment, against Wilcox and Martin, for $550, in damages besides costs. The judgment at law having been enjoined at the August term, 1821, of said court, the injunction was dissolved, with costs and damages; the damages awarded, amounting to $56 33 1-2. Mitchell was statutory guardian to the plaintiffs in error, and their next friend in the prosecution of the suit against Wilcox and Martin. Brent was Mitchell's surety, in his guardian bond. The plaintiffs in error, on attaining full age, instituted a suit in chancery, in the circuit court, against Mitchell and Brents, to have an account of the guardianship transactions, and to compel the defendants to pay the amount due. If does not appear from the pleadings or proof, that any thing is involved in the controversy, except the dam-

Bill in chancery, by pl'tffs. in error vs. def'ts. to account for money received by Mitchell as statutory guardian, & *prochein ami*.

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ages recovered in the suit at law, and in the chancery suit, and the costs of each. The bill charges, that Mitchell had collected all, and failed to pay over, as he should have done.

Resisted, on the ground that the judgments for the money had been commuted for a less sum in horses.

Mitchell does not deny his having settled the amount of the judgments, and received them fully; but insists, acting as he thought best, he compromised and took property at valuation, to-wit: horses; that he sold the horses for $378 62 1-2 only, and, that after deducting proper charges, he had paid over the residue to his wards, in advances as they required.

Statutory guardian, or *prochein ami*, neither has a right to commute the debts or judgments, due ward or infant; if he do he is responsible for the amount and interest. *Quere.* Whether insolvency of debtor constitute an exception?

The first question presented for consideration is, could Mitchell compromise the judgments, and receive horses in discharge of them? It might be made a question, whether he had lawful authority to discharge the defendants Wilcox and Martin, against whom judgment had been rendered, upon any consideration he might think proper to accept from them, other than the amount of the judgments in money; but if he could, in doing so, it does not follow, that his wards would be bound to accept the consideration received by him. On the contrary, we think there is no such obligation imposed upon them, and that when a guardian commutes his ward's debts, or judgments for property, he makes himself debtor to the wards for the amount, if they choose to recognize the discharge of their debtors by the guardian. If there be any exception to this rule, growing out of the insolvency of the debtor, from whom the guardian may receive a trifle, in lien of the whole debt, there is no circumstance in this cause, which can bring Mitchell within the exception. The insolvency of Wilcox and Martin, is not shewn, and the presumption, in the absence of proof, cannot be, that they are insolvent, much less would such a presumption extend to the sureties in the injunction bond. As statutory guardian, Mitchell had no authority to compromise, and to receive property for his wards, in discharge of the judgments, nor had he, as *prochein ami*, any power to do so, which can avail him in this case. As *prochein ami*, it was his duty to prosecute faithfully and diligently. For misbehaviour, he is liable to the infant. We are therefore of opinion, that Mitchell is properly liable to the

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FORBES'S H'S. vs. BRENTS, &c.

plaintiffs in error, for $550, with interest thereon, at the rate of six per cent. per annum, from the day judgment was rendered therefor, up to the time he settled the judgment, by receiving horses, and also for the sum of $56 33 1-3, the damages awarded by the chancellor. Mitchell should be charged with interest on the damages assessed by the jury, on the trial at law, because, on the dissolution of the injunction, he could have collected interest.

The aggregate of principal and interest, due to ward, on the day of commutation, considered as capital in the hands of guardian; if his accounts not settled according to law, responsible, after deducting legal disbursements and advances from time to time, as made extinguishing interest first, and not compounding. *Quere.* Can a guardian, on settlement, be credited for advances beyond the income of his ward?

The aggregate sum thus made up, should be considered as a capital coming to his hands, for his wards, on the day the horses were paid to him, and as he has not furnished an inventory of his ward's estate, and settled his accounts as required by law, he must account for interest, at six per cent. per annum, on the capital, from the day it came to his hands, up to the time of rendering the final decree; but for all intermediate payments, he must have credit as of the days, on which they were made, calculating interest on the capital, to the date of the first payment, and then deducting it from principal and interest, if the payment exceeds the amount of interest; and then calculate interest to the next payment, and so progress, as to pay off the interest first, and yet not to allow compound interest. Holding Mitchell accountable to this extent, it is very obvious, on a slight calculation, that the court has not decreed against him and his surety, as much as the plaintiffs in error were entitled to. From the statements made in Mitchell's answer, and from the depositions, it is clear, that Mitchell did not receive the horses in payment, earlier than August, 1821. He says, they were received, pending a bill of injunction in Washington, which was the last bill filed by Wilcox, consequently, that in Green must have preceded it. The time when the horses were received, does not appear any where in the record. Nor does it appear, that there were more injunctions than one, except from Mitchell's answer. Without its appearing precisely when Mitchell did settle the judgment, it would not do injustice to assume six months after August term, 1821, as the time; because, by diligence the debts might have been replevied and collected within that time, and it does not appear in evidence, that there was any thing to prevent it. On the return

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of the cause, the circuit court will take the February term, 1822, as the date, up to which interest on the $550, is to be calculated, making two years. It is clear from Mitchell's charges for keeping the horses, that they were received sometime before October, 1822, and it may be inferred, that it was later than February, but it can make very little difference in the calculation, whether it is predicated on the ground, that the horses were received in February or the fall following. According to the foregoing principles, at the February term, 1822, Mitchell ought to have received $672 33 for the plaintiffs in error, exclusive of costs. With these costs it is unnecessary to charge him, because, he would have to pay them out in discharging officer's fees, and for which consequently, he ought not to be credited. From this sum should be taken an allowance for Mitchell's services as guardian in collecting the money, superintending suits, &c., say five per cent. $33 61, to which, add $10 for the attorney, over and above the legal fees, taxed for the attorney, &c., recovered as costs, and which sums, not to be resisted by the complainants, and there is an amount of $43 61, to be taken from $672 33, which leaves $628 72, clear of charges, which the plaintiffs in error were entitled to, at the last February term, 1822, of the Green circuit court. This sum, divided into three parts, gives $209 57, for each ward. It was Mitchell's duty by law, to give an account of this to the court of his county, and under their directions, to keep it out on interest, upon such security as they might approve, and to make settlements from year to year. Having failed to do so, he must now answer for the last named sum, with interest to each of his wards, as already directed, from the February term, 1822, of the Green circuit court. But he must have credit for the following sums, as paid at the times specified, to-wit: $62 26, balance after deducting item for lent money and fee bill, both of which are denied, and there is no proof of them, paid his ward, Maria, December 9th, 1822; $33 33 1-3, being one third of the $100 order, in favor of Yates Forbes, to be considered as paid, April 23d, 1823; $36 75, paid his ward, Eliza, April 21, 1823, and her portion of said order, $33 33 1-3, paid April 23, 1823; $39 6 1-4, paid his ward, Patsey, and

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FORBES'S H'S. vs. BRENTS, &c.

$33 33 1-3, her share of said order, in all $72 39, paid 23d April, 1823. There is no date to the important items in the account, exhibited by Mitchell against his ward, Patsey, except the two last, and they are only dated by the year. We have therefore, put the whole credit, under date of 22d April, 1824, *de minimis non curat lex.*

Mitchell cannot enforce his contract with his ward, Patsey, for the mare, because of her non age at the time. The order for $10, is subject to the same objection. Good policy and positive law, alike, render the contracts of infants, voidable. The complainant, Patsey, relies on her infancy to avoid the contract, relative to the mare. But as it is acknowledged in her answer, that the mare was worth $45 or $50 currency, worth half its nominal amount in specie, and as it is shewn in proof, that she sold the mare to Mitchell's son for $42 50 currency, and that too, after she arrived at age, as we think, may be fairly inferred from the evidence, it is not reasonable upon her disaffirmance of the contract, to refuse to account for the value of the mare. It would be unjust that she should appropriate the property to her own use, after arriving at age, without accounting for its value. While, therefore, we exonerate her from the contract, under the privilege of infancy, we do not perceive, under the circumstances of this case, that it would violate any settled principle, to require the complainant, Patsey, to give Mitchell credit for $25, the specie value of the mare, according to her admission. The circuit court will therefore give a credit, for that sum as paid, on the day said Patsey received the mare. The principle that complainants should do justice before asking it, directs us in this particular case. We do not mean to establish a precedent, by which guardians shall be tolerated in withholding the estates of their wards until they account for property, imprudently sold to them by their guardian, and squandered and spent, during their minority. Mitchell must loose the last item in his account, to-wit: $5 for the season of a mare to Conqueror, because it is denied, and there is no proof. On the return of the cause to the circuit court, if Mitchell has made any payments under the decree of that court, they must be credited to him as equity may

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require. The case of Campbell vs. Williams, 3 Monroe, 122; may be consulted on the duties of guardians. It is to be regretted, that their duties in general are so loosely performed. We have no doubt they are often neglected, without any culpable motive, and they are frequently transcended, as in this case, with the alleged design of benefitting the ward, and it may frequently happen, that cases bearing with apparent hardships upon guardians, may present themselves. To these we must say, that nothing can justify us, in tolerating guardians to depart from the law, and if their discretion was made the rule of their conduct, instead of the injunctions of the statute, the abuses to which it would lead, would be more intolerable than the occasional losses, resulting from good motives, and misplaced confidence.

PYLE vs. BECKWITH.

The decree of the court below is reversed, and the cause remanded for a decree, not inconsistent with this opinion. The plaintiffs in error, must recover their costs.

Triplett, for plaintiffs; *Denny* and *Crittenden*, for defendants.

Pyle vs. Beckwith.

CASE.

Error to the Breckenridge Circuit; ALNEY M'LEAN, Judge. Case 115.

Fraud. Limitation at law. Rule in equity.

Judge ROBERTSON, delivered the opinion of the Court. June 10.

THIS suit was brought for an alleged fraud in the sale of a tract of land, of which the vendee was afterwards evicted.

On the issue of limitation, the court instructed the jury that the cause of action did not commence until the eviction. This was erroneous. The suit being for the fraud and not for a warranty, the cause of action accrued, on the sale; and the limitation commenced running *as soon as the fraud was committed.*

At law, the limitation runs from the committing of the fraud. In equity, from the time of discovery.

The rule is otherwise in equity. There the limitation takes date from *the discovery* of the fraud.

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GIBSON, &c. vs. WEIR, &c.

No other error is perceived in the record. But for the misinstruction of the court, on the statute of limitations, the judgment and verdict must be reversed and set aside, and the cause remanded for a new trial.

Wickliffe, for plaintiff; *Denny*, for defendant.

PETITION, &c

Gibson et als. vs. Weir and Anderson.

Case 116.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge.

Release. Plea. Demurrer.

June 10.

Judge ROBERTSON delivered the opinion of the Court.

GIBSON & Co. brought a petition and summons against Wm. Anderson and James Weir, on a note signed "Wm. Anderson & Co." Weir plead *non est factum;* and by leave of the court, at a subsequent term, filed a plea, averring that the plaintiff had released Anderson from further liability on account of the note; whereby he (Weir) was discharged by operation of law. The plaintiffs demurred to this latter plea. No release is shown in the record, except one copied in the deposition of Anderson himself, which is filed. Anderson did not plead; but the court overruled the demurrer to the 2d plea, and thereupon, gave judgment for *the defendants.*

Plea of *release*, must shew that it was under seal, or '*otherwise effective,*' or plea insufficient.

There is nothing in the record, which can sustain this judgment. The plea of release is insufficient. It does not show that the release was under seal, or otherwise effective. And the copy recited in the deposition, (if it could be received,) is without seal.

The demurrer ought, therefore, to have been sustained.

Suit against two, one pleads & issue, irregular to render judgment against plaintiffs, without trial of the issue, and notice of the def't. not pleading.

As there was an issue on the plea of *non est factum*, it was error to render judgment against the plaintiffs without a trial of that issue, by a jury, unless the release had been shown to be such as to bar the action. Nor was it regular to render judgment without either an abatement as to Anderson, or some other legal notice of him on the record.

The judgment is, therefore, reversed, and the cause remanded for proceedings consistent with this opinion.

Combs and *Richardson*, for plaintiffs.

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Wallace vs. Maxwell, &c.

EJECTMENT.

Appeal from the Madison Circuit; THOMAS M. HICKEY, Judge. Case 117.

Boundaries. New trial. Estoppel. Deeds. Patents. Surveys. Mistakes. Fraud. Presumption. Instructions. Exceptions. Error.

Judge UNDERWOOD delivered the opinion of the Court. June 10.

THIS was an ejectment instituted by the appellees against the appellant, to recover a few acres of land. The lessors of the plaintiff claimed under a patent or patents to John Anderson, a deed from him to William Anderson, and a deed from him to Maxwell, and the sole inquiry properly involved in the controversy, was, to ascertain what lands were included by the boundary set forth in the deed, from the patentee to his son William. All other matters were too plain for the slightest doubt or difficulty to arise out of them. Statement of the title of lessors of plaintiff.

Two tracts of land were granted to John Anderson, on the 15th June, 1784, one of 400, the other of 200 acres, adjoining each other, bounded by lines running in the cardinal points. The tract of 400 acres, according to the patent, extended 320 poles from east to west, and 200 poles from north to south; the tract of 200 acres began at the south east corner of the tract of 400 acres, and extended west 300 poles, and south 107 poles. Date of patents, & their courses and distances.

On the 2d of July, 1793, John Anderson conveyed to William Anderson, a parcel of the 400 acres tract, said in the deed to be 200 acres, beginning at the north east corner, and calling to run west 162 poles; thence south, 116 poles; thence west, 2 1-3 poles; thence south, 64 poles; thence east, 166 poles; thence north, 180 poles, to the beginning, calling for trees as corners, at the end of each distance. Deed from patentee to Wm. Anderson.

It is thus manifest, by comparing the patent and deed, that if the patent lines were not shorter than stated to be, between the objects called for, and if the lines in the deed between the corners called for, were not longer than stated to be in the deed, then the southern limit of the 200 acres conveyed, would not reach the southern limit of the 400 acres, as granted, by 20 poles; and yet it is contended by the lessors, that If vendor hold two tracts of land adjoining, and sell a certain quantity by metes and bounds, tho' it call for one tract; yet if the metes

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WALLACE vs. MAXWELL &c

and bounds run into the other, purchaser shall hold according to the metes and bounds.

When the corners are destroyed by violence or time, parol proof to be admitted to point out where they were.

the 200 acres conveyed, may not only reach the southern boundary of the 400 acres' patent, but actually extends over it, into the limits of the 200 acres' patent, and that the lessors must hold part of the 200 acres, because, at the date of the conveyance, both tracts were owned by the vendor and patentee, in case the boundaries of the deed should cover any part of it.

The law is laid down correctly, if the facts will justify its application, but in the absence of satisfactory proof, as to the position of the southern corners of the parcel conveyed, it would never be presumed that they run into the 200 acres tract. All the testimony concurs in showing that the 400 acres tract was not 200 poles from north to south. The southern corners of the tract are not identified by corner trees now standing, corresponding with the patent calls, neither are the southern corners called for, in Maxwell's deed, identified by standing corner trees, corresponding with its calls. The consequence is, that we are dependent on parol proof to locate the corners, or they must be ascertained by running out the corners and distances of the title papers from some known corner. The north east corner of the 400 acres tract, and the south east corner of the 200 acres tract, or the places where they stood, are established by clear, unconflicting testimony. The division corner is not, and as there is not sufficient space between said corners, to give the patent distances, the lines of each patent must be shortened, or one to get its distance must curtail the other. We know of no rule by which to be governed in deciding that the patent distances shall be docked proportionably, for the purpose of establishing the division corner; neither can we say that either patent shall have its full distance, and thereby curtail the other. But it is deemed wholly unnecessary to the merits of this case, to settle how the division corner, between the two tracts, shall be fixed. It is only important to ascertain where the southern corners of Maxwell's deed shall be located, for he has a right to hold up to them. We are of opinion that the weight of evidence very satisfactorily shews that the south east corner of Maxwell's deed, a sugar tree did not stand further south than the letter M, on Tunstall's plat, and the letter A, on Crook's.

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The testimony of James Anderson, the surveyor who, at the request of the patentee, laid off the 200 acres for the lessors of the plaintiff, is conclusive upon this head, and we see nothing in the record to impeach his credibility sufficiently strong to do away the force of his testimony. On the contrary, there are many things to corroborate it, such as the putting up a stone corner, a little west of the point shown by Anderson, as the place where the sugar tree stood, and the well marked line running west from the stone corner; and the fact that Anderson, in order to ascertain the south east corner of the plaintiff's 200 acres, began the survey at the south east corner of the 200 acres patent, and run north the distance called for in the 200 acres patent, to-wit: 107 poles; and the distance from said south east corner to the stone corner, is found now to be only 108 poles, as reported by Tunstall, and 107 poles as reported by Crook. The white oak and hickory stumps claimed by the lessors of the plaintiff, as their south west corner, are disproved by James Anderson, the surveyor, who fixes that corner on the marked line from the stone corner, between the two ash trees, at 12 on Crook's plat. We cannot escape the force of this testimony, except by believing that James Anderson was grossly mistaken, or had perjured himself, and in the absence of all proof, as to the want of credibility, we think his testimony entitled to additional consideration, from the fact that he was employed to lay off the land, for the purpose of enabling the patentee to make the deed, and his swearing that he had been acquainted with the owners ever since.

The province of the jury to judge of the credibility of the testimony but when there is no evidence conducing to sustain a verdict, the court will interpose.

We are apprized that it belongs to the jury to judge of the credibility of witnesses, and if there was any testimony conducing to prove that the south east corner of Maxwell's deed, was further south than the stone corner, we might not be disposed to disturb the verdict; but the only evidence in the cause, which can justify such a presumption, is the call of distance in the deed, making it 180 poles from the north east corner of the 400 acres tract, to the sugar tree called for, as the south east corner of the 200 acres, conveyed by the patentee. That call for distance should yield to

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the positive proof, locating the object called for, at or a little to the east of the stone corner, and this leads us to the consideration of the instructions of the court in regard to the conclusive effect of the calls, in the title papers which we deem erroneous, and in consequence of which, it is more than probable, the jury were lead to disregard the testimony of the surveyor, James Anderson. It may, however, be first remarked, that the testimony of John Anderson, son of the patentee, and brother of Wm. Anderson, fully corroborates the testimony of James Anderson, the surveyor, the two brothers being chain carriers when their lands were laid off by him, and the boundaries marked.

Deeds operate as an estoppel, patents are only *prima facie* evidence of the facts recited, parol evidence may be adduced to contradict or control courses, distances, and other calls of a patent.

In regard to the instructions, it is sufficient to state that the court, in substance, instructed the jury that they were *bound to presume* that the objects called for in the deed, from the patentee, were in existence, on the ground, at the date of the deed, as described in the deed, and that the patents read, were *conclusive evidence* of the facts stated in them, and showed *conclusively*, that the surveys for 400 and 200 acres were not made at the same time, and were not made in one original survey, and that there was a black walnut, constituting the eastern division corner, between the two tracts. We believe the law was not correctly stated, and the effect of the misdirection was to weaken the testimony of James Anderson, and to show that no reliance could be placed on his statements, relative to the manner in which the original surveys had been made, and thereby to destroy his whole testimony. It may be conceded, that a deed will operate as an estoppel, so that the party executing it, and those claiming under him, cannot gainsay the facts recited in the deed; but this rule cannot apply to patents, so as to make them *conclusive* evidence of courses, distances, corner trees, dates of surveys, &c. The patentee and those claiming under him, do not, by any acts of theirs, create an estoppel, nor does the surveyor, who is a mere ministerial officer, upon any legal principle, create an estoppel, thereby binding the patentee and those claiming the land, to regard the grant as containing absolute verity. Such a doctrine is alike at war with reason, and the repeated adjudications of this court. It is admitted that the legal presumption is, that the

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surveyor, register, governor and secretary of state, have done their duty, in regard to the several acts, necessary to be performed by them, in granting lands; and therefore, surveys and patents should always be received as *prima facie* evidence of correctness, but further we cannot go. In Hickman vs. Boffman, Har. 358, this court has defined what constitutes a survey, according to law.

The acts legally done on the ground, by the surveyor, constitute the survey, he may make out the certificate thereafter: any mistake or fraud, in doing it, may be corrected.

It is the acts done on the ground, by the surveyor, in pursuance of lawful authority, which constitute the survey. The surveyor may make out his plat and certificate thereafter, and if he should misstate what was actually done on the ground, either through fraud or mistake, it would be alike preposterous and unjust, to preclude a party from proving the truth, by the production of a false certificate. In Morrison vs. Coghill's legatees, Printed Decisions, 382, the court say, "it is a rule, founded on every days practice and experience, that if a course and distance be called for, and there be a marked line and corner, variant from that course which is *proved* or admitted to be the line made by the surveyor, as the boundary, that the marked line shall be preserved." In Helm vs. Small, Har. 369, parol proof was admitted to reverse the courses called for in the patent. These are leading cases showing that parol proof may be introduced to correct mistakes made in description, and have been since followed without exception, so far as we know. If a patent calls for a black walnut at the end of 200 poles, and it is proved that the surveyor actually stopped at 180 poles, and marked a white walnut or a black locust, as the corner, we cannot admit that the patentee can disregard the corner thus proved, and extend his survey 20 poles further, under the idea that his patent is conclusive evidence, that a black walnut was marked for him, and that not being found, he has a right to run out his distance.

No fact to be presumed, which does not necessarily result from establ-

It is known that surveyors are sometimes given to the practice of making large surveys, and then dividing them in their offices, without going on the ground, with a view to give the locator his part, or because the length was greater in proportion to the breadth than was allowable, or for some other cause. Thus

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there might be on paper two surveys and patents, when in truth, but one was made on the ground. To make the existence of two *paper* surveys, *conclusive* evidence of the making two surveys in fact, on the ground, would be establishing, by presumption, a thing which does not necessarily result as a consequence from such premises, and therefore such a rule would be a violation of those principles of evidence, which respect the order and laws of moral and physical nature, in regard to cause and effect, upon which circumstantial or presumptive evidence is founded. We therefore think the court erred in its instructions.

lished or conceded premises.

We are also of opinion that the third instruction was not strictly proper. In that, the court say, if the jury cannot ascertain *precisely* where the white oak and hickory stood, then the line must extend south the course and distance called for, unless the jury find that there was an actual marked boundary to control the plaintiff. Now, suppose the jury were satisfied within ten feet of the place where the corner stood, yet could not *precisely* locate it, and there was no marked boundary, would that authorize the jury to extend the line south, 10 or 20 poles? We think not. On the contrary, they would not be authorized to carry the line further south than the furthest point, beyond which, southwardly, they should believe, from the evidence, the corner did not stand. In such a case, it would be their duty to locate the corner in their finding, according to the proof, as correctly as they could, and not abandon the proof and follow the distance, if they were convinced that the distance would take them beyond the corner. The instruction of the court was calculated to make them do this, and was, therefore, wrong.

Error to instruct the jury that, unless they can precisely fix the position of a corner, they must recur to the extention of the courses and distances.

We do not deem it important to notice other instructions, seeing nothing objectionable in them, nor do we see any error in admitting the copy of the 200 acres survey as evidence.

The judgment of the circuit court must be reversed, both because the verdict is against the weight of evidence, and for errors in the instructions. At the last term of this court, it was decided that a final exception to the opinion of the court, in overruling a motion

Not necessary to make formal motion for new trial, if all the evidence appear in the record.

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for a new trial, was unnecessary, when the record set out all the evidence, and shewed that a motion for a new trial was made and improperly overruled. The appellant must recover his costs. HENRY vs. HUGHES.

Goodloe and *Caperton*, for appellant; *Turner*, for appellees.

Rowland's Heirs vs. Cock's Administrator.

SCIRE FACIAS

Error to the Washington Circuit; W. L. KELLY, Judge. Case 118.

Scire facias. Judgment for execution. Infants. Guardian ad litem. Appearance.

Judge ROBERTSON delivered the opinion of the Court. June 11.

THIS is a *scire facias* to revive a judgment at law. Several errors are assigned to the judgment for execution, which Cock's administrator obtained. But there is only one which is deemed sufficient for the reversal of the judgment.

Error to give judgment for execution upon *scire facias*, against an infant, unless a guardian, *ad litem*, be appointed, or an appearance entered.

The *scire facias* represents one of Rowland's heirs to be an infant. There was no appearance, nor was a guardian *ad litem* appointed for the infant. The judgment was by default. In this there was error.

And, therefore, the judgment is reversed, and the cause remanded for proceedings conformable to this opinion.

Haggin, for plaintiffs.

Henry vs. Hughes.

COVENANT.

Error to the Nicholas circuit; H. O. BROWN, Judge. Case 119.

Covenant for personal services not assignable. Declaration. Averment.

Judge ROBERTSON delivered the opinion of the Court. June 11.

"FOR value received, I promise to pay Robert A. Long, sixty dollars, to be paid in carpenter's work, whenever the said Long shall call on me for the same. The said work and labor to be estimated at the usual prices for labor of the kind. February 28, 1822.

"JOHN HENRY.

"Test. EDW'D. F. CHAPPELL."

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LAMPTON'S EX'RS. vs. PRESTON'S.

On this covenant, Jesse Hughes, styling himself assignee of Long, instituted an action of covenant. The declaration shows no assignment, it avers none; nor does it aver any demand of the work.

A covenant for personal services, not assignable at law, neither 'stipulating to pay money nor property.'

Henry demurred to the declaration. But the court overruled his demurrer, and thereupon, a writ of inquiry being awarded, a verdict and judgment were rendered in favor of Hughes.

The declaration is radically defective. A demurrer was necessary; and, therefore, some request by Long or Hughes ought to have been alleged.

If this covenant assignable, the declaration defective in not alleging a demand, and an assignment.

The covenant is not assignable at law. It is not a writing stipulating for the payment of either money or property. It is for personal services. A suit could not, therefore, be maintained on it by an assignee.

And if the covenant was assignable, the declaration does not state enough to entitle Hughes to sue. as assignee,

Wherefore, the judgment is reversed, the verdict set aside, and the cause remanded with instructions to the circuit court to sustain the demurrer to the declaration.

Depew, for plaintiff.

TROVER, &c. ***Lampton's Executors vs. Preston's Executors.***

Case 120. Error to the Jefferson Circuit; JOHN P. OLDHAM, Judge.

Accession. Specification. Acquisition of property by addition of value. Trespasser.

June 11. On the 13th of October, 1828, judge MILLS delivered the following opinion of the then Court of Appeals, consisting of Mills and Owsley.

IN a controversy about the boundaries of Louisville between the holders of lots therein, and Preston the owner of the adjoining lands, the latter recovered of Lampton one of the owners of the lots, in an ejectment, a lot, whereon Lampton, who was a brick-maker, had a brick-yard, and when the writ of *habere facias possessionem* was executed, and the possession delivered to Preston, there was in the yard a

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quantity of bricks burnt, ready for use, and a quantity unburnt, which Preston took with the possession of the ground, and he refused to let Lampton remove them, but converted them to his own use, and after the death of both the parties, this action was brought by the executors of Lampton, against the executors of Preston, for the value of the bricks so converted; and the only question involved, is, to whom do the bricks belong; whether to Lampton, who did not own the soil out of which they were made, but of which he was possessed at the time when he made the bricks, or to Preston, who was the true owner of the soil, but who had no hand in making the bricks?

This involves a new question to be decided by the law, which gives a right of property by accession, as it is termed, both in the civil and common law. On this point, the rule seems to be, that no one, by any operation upon, or change of the materials of another, *can* make them his own, except the change is so great as to convert the materials themselves into a different species. Thus, the cloth of another, which without leave of the owner, is made into a coat or other garment, or his leather into shoes, or timber squared and fitted for use, does not vest in the operator; but all the owner has to do, to reclaim his property, in its new shape, is to identify the materials. In like manner, silver being made into cups or spoons, being still silver, can be recovered by the original owner. But if his corn be made into meal, his olives into oil, or his grapes into wine, the change is into a new species, and is so great, that the original materials cannot be reproduced out of the articles, and the new article belongs to the operator, and he is only bound to account to the owner for the value of the original materials. 2 Black. Com. 404; 2 Kent's Com. 293.

By this rule it may be determined to whom the bricks belong. As to the bricks not burnt, there can not be a serious question. They are soil and still, and belong to the original owner, and it is evident that no recovery of their value can be had.

The only difficulty that can arise, is with regard to the bricks that are burnt. They, by the process of fire, have undergone a considerable change

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so great, as to place them nearly on the boundary line of right, between the original owner of the materials and the artist. Still we apprehend that the change is not sufficient to strip the original proprietor of his right. If they had been moulded into glass, the species would have been changed, and as they could not be reduced back to the earth again, the title of the artist would prevail. But this we know is not the fact. They can be dissolved and be made again into soil, although the process by which it can be done, may require both time and labor. It therefore follows, that the property is not changed, and they still belong to the proprietor, who has kept them; and the maker of the brick, who put the materials into that shape, without the leave of the owner, cannot recover.

And as the court below has given the same decision, the judgment must be affirmed with costs.

The counsel for Lampton's executors, filed a petition for a re-hearing, but before it was decided, the members of the then court resigned, and the present judges granted the prayer of the petition.

Petition for a re-hearing.

It is agreed, if the thing was changed, by operation, into a different species, as by making meal out of corn, or bread out of meal, it belongs to the operator, who has only to make satisfaction to the former proprietors, for the materials he had so converted. It is not, however, agreed, the right to the new species, depends on the possibility of re-producing the original materials out of the article. It is said by Justinian, there had been much controversy on the subject of accession between the Sabinians and Proculeans, and that he had taken the middle opinion; and he does say, he determined, that if the manufactured article *can be* reduced to its former rude materials, the owner of such materials shall be reckoned the owner of the species, but if such species cannot be so reduced, then he who is understood to be the owner of it. But he goes on to give the examples, whereby it is clearly seen that he does not mean that the right depends altogether on the *possibility* of reducing the article to the rude materials. He gives these examples: wine can be easily reduced to the rude mass of silver or gold, of which it was made, but lime,

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oil or *flour* cannot be converted into grapes, olives or corn, *neither can mulse be separated into wine and honey.* It is certain, the chemist might separate the wine from the honey, and more easily than he could make land of bricks.

The right depends on whether the species has been changed or not, and that may *generally* depend on whether the thing can easily be reduced to the rude materials converted. We say *easily*, because that is reason, and the language of Justinian, and the examples he and all other writers give, are all of that class. Cases of silver, &c. into cups, is the only class of cases put by him. We say generally, because the proportion, the *value* of the labor bears to the *value* of the materials, may certainly govern. It is said in Justinian, "to us it seems the better opinion, that the tablet should accede to the picture, for it is ridiculous, the painting of an Appelles or a Parhaslus should yield as an accession to a worthless tablet." No one would say, if a man take the flax of another, worth but one dollar, and make lace of it, worth $1000, the owner of the flax ought to have all the lace; and yet there would be no difficulty in reducing the lace to flax. It might be ravelled out and untwisted, with infinitely less difficulty than the chemist would have in making land of hard burned bricks. The rule is, the right depends on the change of the species, or not, taking the language according to the common intendment, and on the proportions of the value of the species produced, to the original material, and the inquiry as to the case and expense with which the article might be reduced to the gross material, is made only *in order to apply the rule*, not as a part of it. But let it be considered under either head, still regard must be had to the difficulty and expense of such reduction, surely, when it would cost ten times more to reduce the manufactured article to its original element, than all the worth, both in the original and improved state. Surely, when no man would have the article, to be used by him, in thus reducing it, and not otherwise, the question of the chemical practicability of the reduction, can never be the subject of judicial inquiry. The owner may reclaim his cloth, though made into a coat.

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He may recover his cups, though changed into spoons: Because the coat is still cloth, and the spoons are still silver, and the metal is the principal value. But shall the iron monger pursue his iron through the steel, into the hand of the seamstress, and recover her cambrick needles? Surely not.

Petition for a re-hearing.

But the rude article taken here, was earth-ground, a part of the realty, and it was worked up into goods, into personal property. If trees standing, growing trees, which are the property of the reversioner, be cut into pollard, they go to the tenant of the particular estate for life or years.

Here the material was changed, into not only a different species, but a different class of property, governed by different laws. And the article produced, is such as no man ever attempted to reduce to the original earth, for the sake of the value of the earth. It does not appear Lampton was a *mala fide* holder of the land, or operator on the rude material. He did not make the brick to build on the ground. A re-hearing is respectfully prayed.

Upon a re-hearing Judge ROBERTSON delivered the opinion of the court.

Preston had recovered from Lampton, a brick maker, the lot on which his brick were made, and the soil out of which made, possession had been taken, under a writ of *habere facias*. There were, upon the lot, thus recovered, at the time possession was taken, a quantity of burnt and unburnt bricks. Preston refused to permit

THE principle which must decide this case, although extensive in its operation, has not been familiar in practice, to the courts of this country; nor has it been ascertained with philosophical accuracy, or defined with satisfactory precision, by either the civil or common law. And if it had been ever so perfectly deduced from the most scientific generalization, its application to this case, depends on analogies so nice, and facts so subtle, as to render the decision of this controversy as perplexing as it is important.

For these reasons we granted a re-hearing, on a petition to our predecessors, which had not been disposed of by them. The cause has been re-argued, and after all the reflection which we have been able to devote to the investigation, we will be compelled to pronounce an opinion entirely differing from that which was rendered.

So much of the civil law as applies to this subject was incorporated by Bracton, in his treatise on the laws of England, and its rules and directions, blended

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with those of the common law. They have been recognized ever since, as the doctrines of the common law, and therefore were transplanted in the American jurisprudence, with the stock on which they were engrafted *.

By exploring the civil and common law, so far as they bear on this case, some confusion will be found in their rules, as well as in the application of them to particular cases. But there are two comprehensive and fundamental rules pervading all the authorities which have been consulted, on the doctrine of accession and of specification; from the first of which it is not known that there are any exceptions, and from the last of which, it is believed that there cannot be many. These rules are: 1st. That no trespasser, who takes property of another wantonly and without the owner's consent, can ever acquire a right to it, by any "accession" or "specification," whatsoever. 2d. When the property of one comes to the possession of another, innocently, he may acquire the right to it, if by "accession" or "specification," *the species* be changed. The difficulties of this case result from the various and indefinite character of the cases which have been excepted from this rule. It is, hence, very difficult to ascertain any principle of uniform and universal application, on which the rule itself is founded. In some authorities it is said that the proper test of the right of the first owner is, the identity of the thing or material. In others, its capacity for being reconverted into the original species; in others, the non-accession of adventitious value exceeding that of the original material; and in others, the retention, by the *material*, of its specific character, or kind or qualities. Thus, for example, Justinian says, in Lib. II, Tit. 1, pa. 75, "that if the species or manufactured article can be reduced to its former rude materials, then the owner of such materials is to be reckoned the owner of the species; but if the species cannot be so reduced, then he who made it is understood to be the owner of it; for example, a vessel can easily be reduced to the rude mass of brass, silver or gold, of which it was made; but wine, oil or flour cannot be converted into grapes, olives or corn, neither can mulse be separated into wine and honey. But if a man makes any species,

Lampton to remove them, and converted them to his own use. Preston and Lampton being dead, Lampton's ex'rs. sued Preston's ex'rs. for the value of the brick. Adjudged, that Preston, as owner of the soil, was entitled to the unburnt brick by paying for moulding, their species not having been changed; but that Lampton, the maker, was entitled to the burnt bricks, from the accession of value, and because their specific character was gone, and their nature so changed by the operation of fire, that they were not resolveable into earth, by 'individual agency,' and if, at all, only by the aid of foreign and extrinsic additions. "If the material

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partly with his own and partly with the materi[illegible] of another, as if, he should make mulse with his own [illegible] wine and another's honey, or should make a garment [illegible] with an intermixture of his own wool with that of an[illegible]ther, it is not to be doubted, in such cases, but that h[illegible] who made the species is master of it," &c.

In page 81, he says that, *if an artist paint a pict[illegible]ure on the canvass of another, the whole belongs to the p[illegible]ainter;* "For (says he) it is ridiculous that the painting [illegible] of an Appelles or a Parhasius should yield as an acc[illegible]ession to a worthless tablet."

"Another rule is, that if the materials of one person are united to the materials belonging to another, by the labor of the latter, who furnishes the principal materials, the property, in the joint product, is in the latter, by right of accession." Kent's Com. 2 vol. 294; see also Merrit vs. Johnson, 7 Johnson, 473. And in this case in 7 Johnson, in Pothier (in his *Tracte du droit, de propriete,*) and in Bracton, it is laid down, that if one "builds a vessel from the foundation, with the materials of another, the vessel belongs to the owner of the materials."

But if *money* be made into a cup, the *property is so altered as to change the title.*" Bro. tit. property, 23. It seems to have been an established doctrine of the common law, as early as the year books, that no change of *mere form* could divest the right of the owner of the material, as leather made into shoes, cloth into a coat, timber into plank, blocks or shingles; in all which cases the material is *not altered in its qualities or kind*, and can be easily identified. 2 Kent's Com. 296; Burris vs. Johnson, 1 J. J. Marshall, 196; and the authorities there cited.

These are some of the doctrines of the books. We shall endeavor to deduce from them something applicable to this case.

As to the first rule, (that a wilful trespasser cannot acquire a title to property by merely changing its species,) it is sustained by authority. See Dyer, 127; Curtis vs. Groat, 6 John's. Repts. 169; and the above opinion in Burris vs. Johnson. But this rule has no application to this case. It is not pretended that

be so essentially changed as to prevent its renovation, by individual agency, the owner has lost his right to it; & that, if the elements of the material have not been changed, but the specific thing which they constituted, cannot be re-produced, identically, by individual operation, the owner of the material does not own the species."

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Lampton was a *wilful* trespasser. The decision, therefore, must depend entirely on the application or some modification of the second rule in relation to the consequences of "accession" or "specification," when there has been no intentional invasion of the property of another.

We are inclined to think, from a survey of all the authorities within our reach, that the accession of mere value, by the application of labor or skill alone, is, *generally*, not sufficient to transfer the proprietorship to the operator. There must, in general, be the addition of some other material belonging to the possessor or operator, before the product can vest in him. If there be any exception from this rule, (and we do not doubt that there may be,) it must be in cases in which the accession of value to the raw material is so far beyond the original value, as to impress on the reason of mankind, the injustice of permitting the *bona fide* producer of that increased value, to be deprived of it. Such may be the case of the statuary. A Phidias, a Michael Angelo, a Canova or a Chantry, might be entitled, by the award of common sense and common justice, and therefore, of common law, to a marble statue of a Pericles, a Venus de Medicis, a Napoleon or a Washington, the "*chef-d'œuvre*" of his genius; although the unchisselled block was the property of another, converted innocently by the artist, without the owner's knowledge, into the emblem of human excellence. This would be the decision of the French civilians, who have exploded the ancient and arbitrary doctrine of the Justinian code, that the author, (a Horace or Dante or a Milton for example) of an immortal Lyric or Epic, would not be entitled to the Poem, if it had been written on paper belonging to another! The reason assigned by Pothier and Toullier, for overruling this unreasonable "decision of the Roman law," is, that the paper is of a value so greatly disproportionate to that of the Poem, that the author should be entitled to the production, by paying for the paper; the composition being considered the principal, and the paper the appendage or accessary. This reason is too comprehensive. For it is not disputed that, if A. make cloth out of the wool of B. or a table or a boat entirely out of the timber of B. though the value of the new spe-

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cies exceeds that of the material more than two fold, the owner of the material, is entitled to the species. It would seem, therefore, that there must be some qualification of the rule, (that no accession of skill or labor merely, will change the right,) and that the principle which must regulate the restriction, is somewhat indeterminate. Every case must depend on its own peculiar circumstances, with only this guide, that the case must be an extreme one, which will authorize an exception from the general rule.

When the authorities speak of rights by "ACCESSION," they generally mean, accession of other materials as well as skill or labor; as in the case of the cloth manufactured out of the wool of a stranger, and of the manufacturer. Here the fabric would belong to the manufacturer; because the several parcels of wool could not be identified and separated. For, to acquire title by "accession" of materials, not only must the commixture be *bona fide*, but the materials which belong to another *must be incapable of being restored to him in their original form; that is, the material must* not possess all its original distinctive qualities; if it do, there has been no *specific* change in the nature or elements of the thing. And a mere change in the external shape or in the bulk, will be immaterial.

Right by "SPECIFICATION," can only be acquired when, without the accession of any other material, that of another person, which has been used by the operator innocently, has been converted by him into something specifically different in the inherent and *characteristic* qualities, which identify it. Such is the conversion of corn into meal, of grapes into wine, &c. Here, although the meal possess no quality which the corn did not, yet it not only does not possess all the same qualities, but there is difference in the name, the character, the solidity, and every attribute which distinguishes one species from another. Meal and corn are as different, as lime and rock, or rye and whiskey. In such a case the rule as laid down in the books, is indefinite, and in some of the cases cited for illustration, seems to be two fold; 1st. That there must be a change of the species. 2d. That the thing changed must be insusceptible of reduction to the original qua-

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lity and kind. The universal application of the latter branch of the rule, seems to be irreconcileable with principle. The reason why the material of one which has been changed into a different species by another, is not to be restored to the original owner is, that it cannot be returned in kind. It is not the specific thing which ~~belonged to him, and~~, therefore, is not his, and cannot be his, (though it may, by some chemical or mechanical process, be resolved into its original elementary qualities,) unless the original material can be restored without any intrinsic change. Therefore, as long as it remains a new and *essentially* different species, it cannot be recovered by suit, from the person who effected the change in it. There may, however, be such a modification of a material of one man, by the operations of another, as to change its name and its specific identity, or individuality, without a mutation of its original qualities and ingredients. Such as the change effected by the conversion of bullion into a cup or spoons, and of timber into plank or shingles. Here the cup is not *the* bullion, nor are the shingles *the* trees. The former is, however, still silver, and the latter are still wood. The inherent and distinctive qualities of the *material* remain the same. In such a case there has been a "specific" but not an *essential* change. The *identity* of *the thing* has been lost, but the *essence* of *the material* has undergone no change; for example, the bullion has been converted into a cup, which it would be improper to denominate bullion. But the essential and constituent particles of each are the same, silver, and the identical silver of the mass of bullion. Here the two fold rule will apply. There has been a change in the species of the thing, but not of the material, and the cup can be reduced to bullion. It retains all the attributes of the lump of silver of which it was made. *It was silver, it remains silver, and the same silver*, it was, without any process of conversion or reduction.

But a cup made of coin, although the essence of the material (silver) is unchanged, can never be restored to coin again by any individual operation. It has lost the impress which gave it currency as coin, and this can never be given to it again, except by the sovereign power.

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Hence it results that if the *material be so essentially changed as to prevent its renovation, by individual agency, the owner has lost his right to it; and that if the elements of the material have not been changed, but the specific thing which they constituted cannot be re-produced identically, by individual operation*, the owner of the material does not own the new species. This is the true and rational doctrine of "*specification.*" Such seem to us to be the rules and distinctions which result from the elementary principles which is either deduced by reason or evolved by an induction of the facts of all the cases reported, so far as they are based on any fixed principle.

Having thus ascertained what we consider the true criterion, we shall proceed to test this case by it.

Accordingly it must be decided that the unburnt brick belong to the owner of the clay, on paying for the moulding. For, although in the form of brick, they could not, with strict propriety of language be called clay, and, therefore, the embedded clay, out of which they were moulded, has undergone some change, yet as the material is still clay, and may be combined into a common mass, and constitute again a substratum for the soil, possessing all the qualities which it had before it was dug up, the owner of the soil can identify the clay in the artificial form of soft brick, and recover it by law. But is this the case, according to the same principle, with burnt brick? We think not.

Whether the right to the burnt brick be tested by the law, either of "accession" or of "specification," it would seem reasonable and consistent, that they belonged to Lampton, who made them.

First; As to the right by "accession." We would venture to decide that in such a case, the accession of value by labor alone, is such as to vest the title to the brick in the manufacturer. A million of well burnt brick may be worth, $5,000. The clay with which they were moulded may not have been worth $20! If the statue, and the poem, and the painting, should belong to the artist and the author, ought not the brick to belong to the operator? The rule for these cases is arbitrary; it must depend on a sound discretion, exercised on the peculiar circumstances of each individual

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case. Therefore, a decision in one case cannot be conclusive authority for any other case of different circumstances. It is not the excess of the artificial over the natural value, but the degree of such excess, that is the controlling principle in such cases. This degree is not and cannot be ascertained with precision, and therefore, the decisions cannot be expected to present an exact conformity to any well defined principle. All that can be known is, that when the disproportion of the value of the material, to that of the product, is so great as to impress on the mind, the justice of considering the material the accessary and the production of the operator, *the substantive species*, the thing belongs to the producer of the new species. In looking at a fine painting, we never consider the canvass; nor when we admire a beautiful statue, do we put any estimate on the primitive marble. It is the new creation of the pencil and of the chisel, which is the sole object of our contemplations, and the sole ingredient in our estimation of value. We look upon and value the one as a fine picture, not as canvass; the other as a noble statue, not a rude unmeaning block of marble. Hence the production of the artist, is the principal, the material is only the incident.

We feel authorized to deduce the same decision from the facts in this case, in relation to the burnt brick. And another important reason applies in some degree to all these cases; that is, that the production of the artist or operator, should belong to him, "*propter excellentiam artis.*" Besides, there is in this case not only an accession of value by labor, but there is also an accession of other things to the clay; sand, water, and the effect of fire by the combustion of wood. And on this [redacted] alone, an analogy to the mulse made of the [redacted] A. and the honey of B. we would feel inclined to think that the brick should belong to him who made them.

But the law of "specification" applies more directly to this case. In this view, it was decided by our predecessors. We shall therefore proceed to consider it on this ground. We are of the opinion that the burnt brick, are not clay. It seems to us, not only, that the process of burning, effected an *essential* change, in the

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qualities of the native clay, and therefore, that the maker, is entitled to the brick; but if there has been no radical change in the material, there has been such an one, as to prevent a re-solution of the brick into clay, or into the same kind of clay as that with which they were made; and, that therefore, the brick belong to the maker. On both grounds or on either, if both or either be maintainable, the plaintiffs must succeed.

A well burnt brick, has very few of the qualities of the unwrought clay. It has not its consistence, its ductility, its compressibility, its tenacity; it can be applied to none of the uses to which clay is adapted. The moisture and every thing else evaporable, has escaped, and does not exist in the brick. Why then should the brick be considered or denominated clay? Limestone is not lime, nor is it the elementary materials of which lime is compounded. In the laboratory of nature, these elements have all undergone an essential change, in the process of petrifaction. Is this change essentially greater than that of clay into burnt brick? The rock, by calcination, may be reduced to lime: so the brick may be pulverized; but the lime is not the identical material which constituted the rock. Nor is the brick dust the same material which constituted the clay; nor can it be reduced to *the same kind* of clay, if indeed (which we do not admit) it can be reduced to clay by any analysys, or combination, *without the accession of other materials, which belonged to the clay in its native state, but which were volatilized*, BEFORE IT COULD MAKE BRICK. Lime is the basis of Limestone. Alumine is the basis of clay. The clay for bricks is a compound *principally* of alumine, and silex. It possesses other ingredients. But when the brick are burnt, they are no more alumine nor silex nor clay, than the rock is lime, either mixed or unmixed with the other materials which composed the rock, or than bone is the phosphat of lime. The ancients made a cover for their dead, by drawing the fibres of silex into thread, which they wove into an incombustible webb. To preserve the ashes of the dead body, unmixed with those of the funeral pile, they enclosed the body in one of these webbs. This fabric, called asbestos was silex alone. But it could not be

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consolidated into a silecious mass as that from which it was drawn. Hence, if one should make it out of the material of another, it would belong to the manufacturer: because, although there has been no change (as in the process of burning brick) in the qualities of the silex, yet, there has been such a change in the species as to render it impossible to restore the native material.

The same reason applies to brick. But another, also applies, to-wit: that the inherent qualities of the clay, have been transmuted by burning. Porcelain is made of silecious and aluminous clay. In strict propriety, could a fine porcelain vase, be considered or denominated clay? Is it clay? Can it be resolved into clay, by any menstruum of nature or art, without the accession of foreign materials or agents? A Wedgewood would be astounded, if he were told, that the finest earthen ware, elaborated by his skill, from the almost worthless clay of another, would be the property of that other. But this ware, however attenuated, is as much clay as brick are, and it can as easily be reduced to clay; but it is not clay, nor can it ever again, *per se*, become clay *It* therefore, belongs to the manufacturer. The diamond is carbon, and nothing but carbon, in a state of purity and high sublimation. But it is not charcoal, though charcoal may produce diamond, by loosing all its gross constituents. If diamond could be produced from charcoal, by any process of art, would it belong to the producer, or to the owner of the rude material? After it shall have been made, it is but the same carbon that existed in the charcoal; but it is in a different state, and is uncompounded. Can it be resolved into charcoal? It would belong to the producer, if it could be manufactured. So the alumine and the silex in the brick, are the same that were in the clay; but they are in a different state and combination, and are not the original clay, with all its combinations and qualities; nor can they be reduced to *the same clay*.

The cambric needle, in the hand of the seamstress, is made of steel, the steel of iron, the iron of the native ore. There has been no chemical change of the particles, which compose the needle; but they are not

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the identical particles which constituted the ore, nor can they be resolved into them. Therefore, the needle could not be recovered by the owner of the raw material.

There would be no end to such illustrations. These are deemed sufficient, for shewing what we mean, when we state the principle, which must govern this case.

Shingles, tables or boats, &c., made out of the timber of another, contain, so far as they contain any thing, the same particles, which constituted the timber, the specific qualities of the wood, are the same precisely; therefore, the material is exactly the same, and the new species must still belong to the owner of the wood, when the accessary value has not been so great, as on the ground, to change the title.

These cases on each side, may serve to exemplify the principle, so far as it applies to "specification." The necessary result, seems to be, that the burnt brick in this case, belonged to Lampton. Preston, in a suit for *mesne profits*, might have recovered for the use of the clay. As the bricks were personal, he could not get them by *habere facias*. He could only be entitled to them as chattles, on the ground that he owned the clay.

The cases cited from 5th and 6th Johnson, do not militate against this opinion, but as far as they go, tend to sustain it. The case of Betts and Church vs. Lee, 5 Johnson, 347, decides, that shingles belong to the owner of the timber, because, "whatever alteration in FORM, property may have undergone, the original owner may take it, in its new shape, if he can identify the original materials;" that is, the form is immaterial, if the material remain *the same*. It is the same in the shingle, as it was in the tree. There has been *no* change in the material, the wood; the only change is in the form. This accords with the doctrine which we have recognized. But the same reason does not apply to the brick, the converse is the fact of the case. The case of Curtis vs. Groat 6 Johnson, 169; decides, that a tresspasser, who knowingly cuts the timber of another, without his consent, and converts it into coal, is not entitled to the coal, *because he is a trespasser*. This is all that is decided. It is true, that the opinion

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intimates, (what it was not necessary to say) that the timber could be identified in the coal, and therefore, if there had been no trespass, the owner of the timber would be entitled to the coal. This would not be our opinion. But we do not suppose, if this intimation were ever so authoritative, that it would influence the decision of this case.

We know that a German chemist (Bergman) claims the merit of having discovered by various experiments near Upsal, that burnt brick, by being made wet, and exposed to the sun and elements for several years, may be dissolved. This discovery is not wonderful. No combination of matter is indistructible. Bricks are not more than other material substances, immortal. Certain solvents, may decompose them. Time will not spare them. But how are they reduced to clay? And what sort of clay? These questions have been anticipated, and the experience and observation of all men, will furnish an answer, consistent with this opinion. The animal, mineral and vegetable kingdoms, are all nothing but a combination of certain particles, which existed in an elementary state, and unorganized form. They may all be decomposed, and reduced to their elements; so of the brick. Sugar is but the sacharine matter of the cane, reduced to a separate and concrete state. It may be dissolved into a sweet juice. But it does not therefore belong to the owner of the cane.

Bricks are very enduring, when well burnt by fire. It is said by some oriental tourist, that even now, there remain, at the supposed scite of ancient Babylon, Brick, apparently in a perfect state, of which that city was built. Time has not reduced them to clay; and it never will, without the co-operation of other agents, and the accession of other materials, any more than the sugar of the maple can be resolved into "*sugar water*," without the access of foreign agents.

The only thing like an authority, directly on the subject of the proprietorship of brick made by one man, with the clay of another, of which we have heard or which we have seen, is an expression in the opinion in the case of Port vs. Tuston, 2 Wilson's Reports, 172. In deciding, in relation to another matter, the court

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BARROW vs. JONES.

say, "*The case of a brick maker, is very different; the earth is manufactured, and turned into quite, a different thing.*" Of course it was the opinion of that court, that the brick belonged to the maker. This we acknowledge is not positive authority, but is persuasive argument: and being the only allusion which has been found in any book, to the question we are considering, is strongly confirmatory of the reasons, which we have offered in support of this opinion.

Judgment reversed, and cause remanded for a judgment to be entered on the agreed case, in favor of the plaintiffs.

Monroe, for plaintiff; *Denny* and *Haggin*, for defendants.

CHANCERY.

Barrow vs. Jones.

Case 121.

Error to the Pulaski Circuit; JOHN L. BRIDGES, Judge.

Bill for new trial. Discovery of testimony. Negligence of Attorney.

June 11.

Judge UNDERWOOD delivered the opinion of the Court.

Statements of compl'nts. bill.

JONES sued Barrow and Cooper in the circuit court, in an action of covenant, they plead *non est factum*, and on the trial, the jury found for the defendants. Jones then filed his bill in chancery, enjoining the judgment for costs against him, and praying for a new trial at law, which upon hearing, was ordered by the chancellor, as to Barrow alone, the bill being dismissed as to Cooper. The ground relied on in the bill is, that Jones had put the instrument on which suit was brought, in the hands of an agent, who placed it into the hands of an attorney, who brought suit thereon; that at the time of the trial the agent was dead; the complainant, Jones, a non-resident, and the attorney ignorant of the witnesses to call or have summoned to prove the execution of the covenant, and that he had discovered important testimony, which, in addition to that previously known to him, would enable him to succeed on another trial.

Compl'ts. at.

We are of opinion that the bill does not present a case which authorized the relief given. It was the

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fault of the complainant's attorney, to go into trial unprepared, or if he did, to suffer a verdict to be rendered in the absence of the complainant, or any authorized agent. For injuries resulting to clients, from negligence or inattention on the part of their attorneys, courts cannot give redress against the other party to the suit. Redress must be sought in a new action, against a new party.

torney going into trial unprepared, & suffering a verdict against his client, in his absence, no ground for a new trial.

The discovery of evidence or new testimony relevant to the point in issue, which, by reasonable diligence, could have been produced, is no cause for a new trial; going into trial unprepared, should rather operate against an application for a new trial, instead of in its favor. Where it does not clearly appear, that the result of a new trial ought to be in favor of the applicant, it should be awarded with much caution, if at all. The authorities are abundant on these points.

The discovery of new testimony, relevant to the issue which might have been had on the trial, by the use of industry, no ground for new trial.

The record shows that the attorney for Jones was, at least, so far attentive to his interests, as to call and examine witnesses for him, on the trial at law. The subscribing witness was examined, and he disowned and disproved the covenant. The testimony of the complainant, taken in the chancery suit, although it is sufficient to excite our suspicions, that he has been imposed on, yet it is by no means conclusive. Every view of the case satisfies us that the verdict and judgment at law, ought not to have been disturbed.

The record at law, and the testimony in the chancery cause, do not justify disturbing the verdict and judgment.

Decree reversed with costs. The complainant's bill must be dismissed with costs, and his injunction dissolved with damages.

Cunningham, for plaintiff.

Brown vs. M'Kee's representatives.

CHANCERY.

Error to the Pulaski Circuit; CHRISTOPHER TOMPKINS, Judge.

Case 132.

Writ of error. Variance. Jurisdiction. Action, local and transitory. Statute. Process to several counties. Proceedings in rem; in personam.

Judge UNDERWOOD delivered the opinion of the Court.

June 11.

In May, 1806, M'Kee, in his lifetime, filed a bill in the Pulaski circuit court, against Brown,

M'Kee's bill vs. Brown,

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BROWN vs. M'KEE'S REP.

charging fraud in a contract.

charging him with fraud in a contract, relative to a tract of land, lying on Cumberland river, and praying for relief. A subpœna issued on the 2d day of June, directed to the sheriff of Franklin county, which was executed on the 20th of the same month, returnable to the July term of said court.

Steps taken on the rule docket: bill taken for confessed.

At the July rules (for at that period the laws regulating proceedings upon the rule docket, were in full force,) the complainant, by his counsel, gave a rule for answer. At the August rules, the cause was continued until the next rule day for answer. At the September rules, the bill was taken *pro confesso*.

Motion to set aside the rule and file his answer, by Brown, refused.

At the October term of the court, Brown, by his counsel, moved to set aside the rules taken in the clerk's office, and for leave to file his answer, which was refused by the court, and to this he excepted. At the same term, the cause was taken up for trial, and argued by counsel on both sides.

Interlocutory and special decree.

The court took time, and at the April term, 1807, entered an interlocutory decree. The cause was continued under the interlocutory decree, in order to execute a writ of inquiry, directed by it, until the July term, 1812, when the inquiry was had, and final decree rendered.

Writ of error.

To reverse this decree, Brown sued out a writ of error, on the 27th May, 1814, returnable to the 50th day of the then sitting April court.

Grounds for quashing writ of error.

It is now moved to quash the writ of error. 1st. Because it does not identify the record and case to be brought up to this court. 2d. Because it is returnable to a day previous to its date. And, 3d. Because it is wholly void on its face.

A writ of error, which correctly describes the nature of the action, the parties, the court in which the writ was

The writ of error describes the record and proceedings, which the clerk of the Pulaski circuit court is commanded to send up, as "a certain action in chancery, between Samuel M'Kee, complainant, and John Brown, defendant, pending before the judges of said court, and in which a decree was pronounced at the July term, 1812, to the damage of the said John Brown." The record brought up, corresponds with this description, as to the nature of the action, the

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parties to it, the court in which it was decided, and the term when the decree was rendered. I am of opinion that more need not be done, by way of description in a writ of error. If there are two suits between the same parties, which equally suit the description given in the writ, the defendants in error can easily learn when the record is filed, in this court, which is intended to be revised. They are brought before this court by summons, and when in court, they should not be permitted to evade a trial, upon the merits of a cause, upon the ground, merely, that such description was not given in the writ of error, (which is not served on them,) as would identify the record, brought up in such manner, so that the idea should be excluded, that there could be any other record like it. Indeed, such a description might be impossible. Good sense does not require it. There is no variance between the writ of error and the record. They correspond as far as the writ goes, and I think it goes far enough.

pending, and the time at which decree or judgment was rendered, is sufficiently certain. It is not necessary that it should be sominutely certain, as to preclude the possibility of there being any other record, like that required to be brought up.

This court commenced its April term, 1814, on the 4th day of the month. The writ of error is returnable to the 50th day of the court. In making the calculation, to ascertain whether the 50th day of the court, came before or after the 27th of May, the date of the writ, Sundays are to be excluded. No other than juridical days are to be taken into the computation; for if we were to include Sunday, and count it for any purpose, as a day in court, we should not reject it on any occasion, for the sake of consistency; and thus Sunday, in our circuit courts, would, when they set more than one week, be the *seventh* day of the term. A notice to appear on the seventh day, if literally complied with, would, therefore, require the party to attend on Sunday, at the court house, which would be absurd, as he would then find no court in session. To avoid things so ridiculous, when reduced to practice, we enumerate days in court, beginning with the commencement of the term, and going on regularly to its end, taking no account of Sundays. By this rule, the 50th day of the court was after the 27th of May, and the writ of error ought not to be quashed, for the second reason assigned. There is nothing in the third

In ascertaining whether the return day of a writ is anterior to its test, Sundays are excluded, none but juridical days are calculated.

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BROWN vs. M'KEE'S REP.

reason. I am, therefore, of opinion, that the motion to quash the writ of error, ought not to prevail. It is overruled.

To give jurisdiction, either the thing to be acted on or the person of the def't., must be within the circuit.

Considering the cause as properly before this court, for adjudication, the first error assigned, which I shall notice, is that which questions the jurisdiction of the Pulaski circuit court. The cases of Dunn and wife vs. M'Millin, 1 Bibb, 409; and Cave vs. Trabue, 2 Bibb, 444, are expositions of the 7th section of the act, creating circuit courts, in regard to their jurisdiction; and from these, the rule is clearly established, that the thing to be affected by the judicial proceeding, or which gives locality to the action, must lie within the circuit, or that the person of the defendant, must be within the circuit, in order to give jurisdiction.

Process may issue from the circuit in which a suit is instituted, to other counties; but if no decree or judgment against resident def't. unless the action be local, it is the *ex officio* duty of the court, to dismiss the suit.

It is true, that process, both at law and in chancery, may issue from the circuit in which the suit is instituted, to other counties; but in these cases, the action must be local, a proceeding *in rem*; or part of the defendants must be in the circuit, where the suit is brought. In the last description of case, it is well settled, that if a decree or judgment is not rendered against the parties found in the county, or one of them, no judgment or decree can be rendered against those defendants, living out of the county. In such case, it is the duty of the court, *ex officio*, to dismiss the action as to the defendents out of the county. See Majors vs. Gunnell, 4 Monroe, 450; Austin's heirs vs. Bodley, 4 Monroe, 437.

No allegation in M'Kee's bill, to give jurisdiction.

M'Kee's bill does not allege that the land in relation to which the fraud was practised, lies in Pulaski. It does not state that the suits brought against him, upon the notes given for the land, were instituted in the Pulaski circuit court, and which suits by the prayer of the bill, the court is asked to suspend by injunction, which does not appear to have been granted. The bill is not filed to have a conveyance, or any act done in relation to the land. The sole object of the bill is, to compel Brown to refund part of the purchase money paid him, and to surrender the notes for the residue. It is, therefore, clear, that M'Kee's cause of action was transitory, and that the Pulaski circuit court had no

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jurisdiction of it, by bringing the defendant before the court, with process, directed to the sheriff of Franklin.

It is contended, however, that if it be clear, that the court had no jurisdiction in the first instance; that under the circumstances of this case, Brown cannot now avail himself of it. It appears from the record, that *Brown, by his counsel*, made many motions, and gave consent to continuances of the inquiry, directed, from term to term, but in all motions made in his behalf, he was overruled. His first motion was, to get clear of the rules entered against him, by which the bill had been taken for confessed, and failing, the cause was heard, and at a subsequent term, decreed against him. It is true, that argument was made for him, but what the nature of the argument was, cannot be told. If it had been insisted, that the court should dismiss the bill, for want of jurisdiction, that argument should have prevailed. So far as the record speaks in the first stages of the cause, Brown was desirous to make defence, by filing an answer, and although it does not appear what would have been the nature of that answer, I cannot presume that it was an acknowledgement of the allegations of the bill. If it had been, surely the complainant would not have objected to his filing it, especially, as the court considered the case of such difficulty, after argument, as to require time for advisement. Every step taken by Brown, indicates an opposition to a decree against him, and hence no presumption can be indulged in, that he favored and consented to the steps taken by the complainant against him. Besides, if he did so acquiesce, it was a tacit acknowledgement of the improper conduct charged upon him, in the bill. The case should be clear, before we come to the conclusion, that any man has consented to his own degradation. I cannot admit, therefore, that Brown has done any act which amounts to a waiver of his right, to object to the jurisdiction of the Pulaski circuit court. I am not prepared to say that he was bound to put in a plea to the jurisdiction, until the rule taking the bill for confessed, was set aside The term at which he made the motion to set aside that rule, was the first after the rule was made; and as his motion was overruled, he never did

Appearance and defence to the merits, a waiver to all objection to jurisdiction the court having cognizance of the subject matter in controversy; but when a party resists a decree and is refused permission to answer, making a motion to be permitted to answer and the argument of counsel against a decree, can not be construed such an assent to the proceedings as will yield jurisdiction.

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Brown vs. M'Kee's rep.

appear to the suit as a defendant, upon the merits. The court would not permit him to appear in that character, and make defence. If the court had permitted him, and he had gone on and defended, upon the merits, I am willing to concede that such a course on his part, might have amounted to a waiver of all objections, to the jurisdiction of the court; inasmuch, as the subject matter of the bill was such, that the court could legally take cognizance of it, in like cases, when proper parties were subject to its jurisdiction. But when the complainant objected to granting Brown permission to defend, by filing his answer, and the court sustained the complainant, I am of opinion, that it would be, unjust, to give to an appearance, entered for the purpose of asking the court for leave to defend an operation, by construction, so as to make Brown sanction an *ex parte* proceeding against him.

Express consent cannot give jurisdiction, the tribunal not having cognizance, by law of the subject matter.

Express consent cannot give jurisdiction where the court has not, by law, cognizance over the subject matter; where the court has such cognizance, the consent may. Here there is no express consent, and I cannot infer it from any thing apparent upon the record. I am, therefore, of opinion that the Pulaski circuit court should *ex officio*, have dismissed the bill of the complainant for want of jurisdiction. Having reached this conclusion, it is unnecessary to notice any other error assigned, and it would be premature to express any opinion on the merits of the controversy.

Mandate.

The decree of the circuit court is reversed, with directions to dismiss the bill without prejudice, because that court had no jurisdiction of the case. No decree for costs can be rendered against the present defendants, they being the representatives of M'Kee, and suit being prosecuted against them in that character only.

Mills and *Brown*, for plaintiff; *Owsley*, for defendant.

The counsel for the plaintiff in error, presented the following written suggestion.

Suggestion.

That costs were always recoverable against executors *defendants*, from a very early date in England, See 2 Bacon Ab. 46, and the reason there given. These decisions possibly apply only to costs below and

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the question may still arise whether the statutes of Gloucester, &c. included costs on a *writ of error*.

Suggestion.

The act of 1796, 1 Digest, 343, says, that in appeals and *writs of error*, the following rules shall be observed: "If the judgment or decree shall be reversed in the whole, the appellee shall pay to the appellant such costs as the court, in their discretion may award." It must have been on the construction of this section that our court of appeals have, in such numerous cases decreed costs against executors, defendants in error. The only change which our statutes have made, in favor of executors, is that which has been derived from the construction given to the act of 1811, which the court have construed to extend to *costs* also, making them recoverable *de bonis testatoris* and not *de bonis propriis*. The above mentioned act of 1796, makes no exception in favor of executors, and is, therefore, applicable to them equally with other defendants in error. The present case is somewhat peculiar. *The writ of error was sued out and pending for twelve or fifteen years, during the lifetime of the testator*, during all of which period, costs had accrued against the plaintiff in error. It was but recently revived against his executors, and if costs were ever discretionary in such cases, it is conceived that they should be awarded in this; at all events, the costs which accrued during the life of the testator,

Upon which the judge made the following modification of the mandate and decree.

Upon the suggestion of counsel, I deem it proper to modify the above, so far as to decree costs against the defendant, to be levied *de bonis testatoris*, for all costs incurred previous to the revival of the suit against the defendants. The clerk will enter a decree accordingly.

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Motion.

Conn's Heirs vs. Manifee.

Case 123.

Error to the Fayette Circuit; Jesse Bledsoe, Judge.

Occupant law of 1820. *Constitution.*

June 12.

Judge Robertson delivered the opinion of the Court.

The only question which we shall consider in this case, is, whether the assessments for improvements were properly made, in conformity to the occupant act of 1820.

The assessment of improvements, under the provisions of the occupant law of 1820, adjudged to be *constitutional.*

The suit was brought in 1818, the assessments made in 1822, and the judgment of the court on the report, was rendered in 1823.

It has been decided by this court, in the case of Fisher vs. Cockrell, 5 Monroe, 129, that so much of the occupant act of 1820, as relates to rents and improvements, is constitutional. We feel no disposition to disturb this decision. According to the authority of this case of Fisher vs. Cockrill, and of the cases of Payne vs. Conner, 3 Bibb, 180, and of Fowler vs. Halbert, 4 Bibb, 52, it was proper, in this case, to make the assessments of improvements under the provisions of the act of 1820.

The circuit court having approved the report made according to this act, the judgment is affirmed.

Chinn, for plaintiffs; *Wickliffe* and *Wooley*, for defendants.

Motion.

Gaines vs. Dailey.

Case 124.

Error to the Franklin Circuit; Henry Davidge, Judge.

New trial. Duty of Court. Condition.

June 12.

Judge Robertson delivered the opinion of the Court.

An order, granting a new trial, the defts. paying the costs of first trial, 20 days prior to the next term, a nullity, and

Dailey having obtained a judgment against Gaines, in an action of assumpsit, the court on the motion of Gaines, made the following order, "28th July, 1827. The court being now sufficiently advised of the motion made for a new trial herein, it is ordered, that it be granted *on the defendant's paying the costs of the former trial herein, twenty days before the next term of this court.*"

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Before the next term, but within the 20 days; Dailey issued an execution on the judgment. Gaines moved the court to quash this execution, which the court refused to do. And for this refusal, Gaines has prosecuted this writ of error.

GAINES vs. DAILEY.

the pl'tff. has a right to his execution.

The order of the court, is extraordinary; and it is difficult to give to it, a satisfactory construction. If it be construed to be the grant of a new trial, on a condition subsequent, the execution might possibly have been quashed; but if it be understood to be an order for a new trial, on the precedent condition of payment of the costs, the execution issued properly.

We are inclined to the opinion, that the court intended, that the judgment should be suspended until 20 days preceding the next term; and that then, if the costs should be paid, there should be a new trial. The parties were notified, that there would be a new trial, on a certain contingency. But the court had not given a new trial. Such an order, should be regarded as a nullity, even if the defendant had complied with the condition. Courts ought not to leave their judicial acts, to depend on an act *en pais*, or to be controlled by ministerial officers. When a motion is made for a new trial, only three things are left to the discretion of the court; that is, either to continue the motion, or to grant, or overrule it. The court cannot refer to the parties or to the clerk, a decision of the question, whether there shall be a new trial or not.

Dailey had a right therefore, as soon as the term expired, to issue his execution. But if the order of the court had been such as to deserve respect, there seems to have been no ground for the quashal of the execution. Because, as Gaines was to be entitled to a new trial, on the condition of paying the costs 20 days before the next term, he ought to have shewn such payment, before he could expect to be benefitted by the order. This he did not do. And no further notice is taken of the case, at any subsequent term.

Wherefore, the judgment of the circuit court, overruling the motion, to quash the execution, is affirmed.

Triplett, for plaintiff; *Sanders*, for defendant.

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CHANCERY.

Cummins vs. Boyle.

Case 125. Error to the Nelson Circuit; PAUL I. BOOKER, Judge.

Recision. Parties. Executory or executed contract. Defect of title. Equity.

June 12. Judge ROBERTSON delivered the opinion of the Court.

This was a bill in chancery, filed by vendee, to rescind the purchase of a tract of land, upon alleged defect of title, for which he had accepted a deed with warranty. Compl'nt. no claim to rescision, for any defect of title which existed, and of which he had notice, at the time he accepted the deed. When the remedy at law is complete, and no obstruction appears, the chancellor will not interfere. Bill filed for recision of contract for land, security in the bond for purchase money, and all interested in the title, or to be affected by the decree, should be made parties.

By the will of John Cummins, (proved in 1813) his home tract of land, in Nelson county, containing 150 acres, was devised to his widow, Elizabeth Cummins, during her life, and to seven of his children in remainder.

One of the devisees in remainder (Elizabeth jr.) was an infant in 1819; and another (Anne) had died before 1819, leaving an infant natural child, her heir.

In February 1819, Elizabeth Cummins the widow, sold the tract thus devised, to William Boyle, for $2,400, and executed a bond for a title thereto, by deed of general warranty, on or before the 1st of October, 1819.

In September 1819, the widow and all those entitled to the remainder, excepting Elizabeth jr. and the infant of Anne, executed, acknowledged and delivered to Boyle a deed of general warranty, for the entire tract of land, for the consideration of $2,400; which deed he accepted. He took possession of the land, and still retains the possession and use of it.

As soon as Elizabeth jr. attained legal discretion, she conveyed all her interest in the same tract of land to Boyle, by deed, which he also accepted.

Boyle having failed to pay a part of the consideration, Mrs. Cummins obtained a judgment against him, and also against Bard, his security, for $400, in September, 1825.

In October, 1825, Boyle filed his bill in chancery, against Mrs. Cummins, to enjoin the said judgment, and to rescind the contract for the land, unless the interest of the infant heir, Anne Cummins, could be conveyed to him. The injunction was granted, and on the final hearing, the contract and deeds for the land, were decreed to be rescinded, the injunction was perpetuated, and Mrs. Cummins directed to refund to

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Boyle, the amount which had been received for the land.

To reverse this decree, this writ of error is prosecuted.

The decree is erroneous for several reasons; 1st. There is a defect of parties. Beard ought to have been a party. This is too obvious to require argument or authority. Before the deeds could be cancelled, all those who were parties to them, and could be affected by the decree, should have been made parties to the suit. But Mrs. Cummins is the only defendant. The decree is therefore indefensible on this ground. 2d. By accepting the deeds from Mrs. Cummins, and all those in remainder, except the infant of Anne Cummins, Boyle is estopped from urging any defect of title, which existed at the dates of those deeds, and of which he then had notice. And without proof of fraud, or insolvency, his redress, if he shall be entitled to any, would be purely and exclusively legal. Findley's executors vs. Lynch *et al.* 2 Bibb, 566.

For defect of title, the contract may, *under sufficient circumstances*, be rescinded, if it be executory. But if the conveyance be made and accepted, the vendee cannot resort to a court of equity for a recision, merely on the ground of a defect of title. Miller vs. Long, 3 Marshall, 335.

The defect in the title is not of sufficient magnitude, to authorize a recision of the contract for that cause alone. There is no proof or even allegation, that the interest of one of those in remainder, can very materially affect the contract for the land; nor that a knowledge of the impossibility of procuring that remote interest, would have had any influence, in preventing the purchase; nor that there is any peculiar reason for apprehending (or even that it is apprehended) that this interest may not be obtained in due time; nor that Boyle has been, or is in danger of being disturbed in the possession of the entire tract of land; nor that his remedy at law, if it shall ever become necessary to resort to it, will be inadequate to his full indemnity. Therefore, the defect of title being so minute, and comparatively unimportant, the contract, if yet execu-

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CUMMINS vs. BOYLE.

tory, would not for that alone, be rescinded. Reynold's vs. Vance, 4 Bibb, 213; M'Coun vs. Delany, 3 Bibb, 46. Sugdon on vendors, 183–5–6–9. Cates vs. Raleigh. 1 Monroe, 168.

Where land is held by several in common, or in joint tenancy, a purchaser could not be compelled to accept a deed, unless it should convey the interests of all: Because the right of any one, might interfere with the exclusive enjoyment, by the purchaser, of the interests conveyed to him, by the others. But in this case, the purchase was made, and the deeds accepted with full knowledge by Boyle, of the right of the infant child of Anne Cummins. He was living in the neighborhood of the land; was well acquainted with Mrs. Cummins and her family; could have had access to the will under which she claimed her right to the land. The manner in which she and her children held and derived title to the land, was notorious, among the neighbors generally; and, therefore, there can be no doubt, that Boyle had actual notice; if he had not, the law will imply notice; and it was his duty to examine the title, by doing which, he would have been led to the will. Besides, the will being on record in his county, he is presumed, in the absence of all other circumstances, to have known its existence and tenor. But even without these facts, the acceptance of the deeds from Mrs. Cummins, and six of her children, would certainly be sufficient evidence, that Boyle knew, that the children had some interest to convey. And it is positively proved, that he not only did know when he made the contract, that Anne Cummins had left an infant heir, but that, that heir was entitled to an eventual interest in the land which he was buying. These facts present another objection to the decree, and that is: 4th. That Boyle is not entitled to a recision of the contract, for any defect of title, of which he had notice, when he entered into the contract of purchase. Sugdon, 192–3; Craddock vs. Shirley, 3 Mar. 288. With the facts of this case confronting him, Boyle certainly presents himself before the chancellor with a bad grace, demanding a recision of a contract, for a defect in the title of which, he not only was bound by principles of law and equity, to have taken notice, but

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of which he had full, actual notice; not only when he negotiated the purchase, but when he accepted the deeds, and by receiving which, he waived all right to demand a recision. CUMMINS vs. BOYLE.

The alleged removal of Mrs. Cummins from the state, cannot entitle Boyle to a recision of the contract, if as already shewn, he is otherwise destitute of pretence of right to demand it. The only effect which could result from the removal, would be, that under *appropriate allegations and proof*, it might entitle Boyle to an injunction for the value of the infant's interest in the land until it should be conveyed to him. But before it could have even this effect, it must appear that there would be no redress at law. If, therefore, Mrs. Cummins were the only person bound to Boyle for the title, or if the others were insolvent or inaccessible, the chancellor might interpose, to prevent an irreparable loss. But not only does neither of these indispensable facts appear; not only is neither, alleged or proved, but it is evident that suit at law, might be brought on the covenant in the deeds; and it is to be presumed, that such suit would be availing, if Boyle has any right to damages. If he could not recover damages for breach of the covenant of warranty, "*a fortiori*," he could neither rescind the contract nor enjoin any portion of the judgment. Whether he could recover for breach of warranty, would be doubtful. He says that the bond for a title, is lost, and he has exhibited what he supposes from recollection, is a substantial copy. Whether it was lost is uncertain. It might be more probable, that the acceptance of the deeds, being understood to be an extinguishment of the bond, it was surrendered when the deeds were delivered. Whether this be so or not, it is very questionable, whether any suit could be maintained on the bond after the deeds were accepted. But if any could, and the bond were really lost, a suit at law, could be brought on the deeds, and the loss of the bond, would not therefore, give jurisdiction to the chancellor. And it is proved by one witness, that he read the bond, and that it contained a provision that Boyle was to wait for the title of the infant, Elizabeth, until she should attain 21 years of age. This would not only, of itself, prove notice in fact of the nature of the title, and a

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HUNT vs. BOYIER.

waiver of a right to action for defect of title, by reason of Elizabeth's interest, and temporary inability to convey, but would tend to evince an understanding, that the infancy and inability of the heir of Anne, should not produce any breach of the contract for the title.

These considerations, however, could be material, only, in a suit at law for damages.

Boyle having had knowledge of the nature of the title, when he made his contract, and having afterwards accepted deeds, and enjoyed the undisturbed occupancy of the land, cannot be entitled to a recision of the contract. And as he has complete and unobstructed remedy at law, from any thing appearing in the case, he is not entitled to an injunction or any other relief in equity.

The decree of the circuit court is therefore reversed, and the cause remanded, with instructions to dismiss the bill, and dissolve the injunction, with costs and damages.

Chapeze, for plaintiff; *Hardin*, for defendant.

CHANCERY.

Case 128.

Hunt vs. Boyier.

Error to the Whitley Circuit; JOSEPH EVE, Judge.

June 13.

New Trial. Jurisdiction. Power of Chancellor. Discovery of testimony.

Money paid upon an execution, cannot be recovered in equity, unless the creditor have procured the payment fraudulently. So long as the judgment remains in force the chancellor is precluded from de-

Judge ROBERTSON, delivered the opinion of the Court.

THIS was a bill in chancery, filed by Hunt vs. Boyier, for a new trial of an action of trover, in which the latter had recovered a judgment for $45, and costs against the former.

Two questions are presented by the record: 1st. Had the court *the power* to render the decree which it did? 2nd. Did the facts justify any decree for the complainant below?

The court, by an interlocutory order, directed to be served on Boyier, required him to submit to a new trial. On his refusal to consent to a new trial, the court

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made a final decree, adjudging to Hunt against Boyier the amount of the judgment at law; that judgment having been satisfied by execution.

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decreeing restitution.

We cannot concede to the court the authority to render such a decree. The chancellor cannot set aside a common law judgment by decreeing a new trial peremptorily. When he determines that a new trial is proper, he can enforce his decree only by operating on the person of the defendant by attachment, sequestration, fine or imprisonment; or by injunction, if the judgment shall not have been satisfied. Litt. sec. ca. 451. Nor can he, if the judgment at law shall have been paid off, decree that the amount be refunded. As long as the judgment shall stand unreversed and unaffected by a new trial, it secures to the creditor the money which he may have collected under it. The chancellor cannot reverse or nullify that judgment; nor compel the creditor to surrender what he may have acquired by it, unless it had been obtained fraudulently.

The chancellor, in this case, has exercised the powers which belong alone to a jury and a judge of law. He has not only adjudicated on the evidence and decided that the verdict and judgment obtained by Boyier are erroneous, but has decided that he shall refund the amount which they enabled him to collect. The controversy is perfectly legal, and can be re-tried only in a law forum. Hunt can have no right to restitution while the judgment shall remain in full force; and whenever by a new trial he shall have such right, his remedy for it will be legal. Chancery cannot entertain jurisdiction of a claim to a reimbursement of the amount paid on the judgment, on the ground that the complainant was not ready for trial.

The decree of the chancellor is, therefore, erroneous and must be reversed on this ground.

A chancellor may direct a new trial at law, where the common law judge

But there is error in the second point, more extensive in its effect, and more fatal to the claim of Hunt to relief, than that which has been noticed. The allegations and proof did not authorize a decree for a new trial.

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HUNT vs. BOYIER.

would: provided sufficient reason be given for not having applied to the common law judge.

Boyier had loaned to Hunt, a horse to ride to Lexington. The horse died on the way, and Boyier insisting that the death was the effect of the negligence and excessive hard riding of Hunt, sued him for the horse in trover, and recovered forty-five dollars.

Execution on the judgment was replevied for *two years*, and the replevin bond satisfied after it became due. Hunt *afterwards* filed his bill for a new trial, relying on the allegation, that he was *in the South with stock at the time of the trial*, and had discovered *since his return home*, that he could prove that when he borrowed the horse, he was unsound. Several depositions were taken, which leave room for reasonable doubt, whether the horse was unsound or not. But there is no proof that he *died* of any such unsoundness, or that it was at all probable that he would not have died if he were perfectly sound at the loan.

It was proved that an agent and a lawyer defended the suit at law for Hunt. That under the general issue an attempt was made to prove the unsoundness of the horse. It also appears, that Laughlin who rode with Hunt to Lexington, was a witness on the trial before the jury.

On these facts several objections to the decree obviously appear.

The allegation of absence on private business, insufficient. Discovery of new testimony or additional witnesses to points in issue no ground for new trial.

1. The allegations of the bill are insufficient. The excuse for not making full proof on the trial, is very defectively and indefinitely set out, and would not be good, if it had been stated with ever so much precision. It is not alledged, when the discovery was made of the new testimony, except that it was after the judgment. Was it after or before the payment of the money? If before, why was not the bill filed sooner? If after, why was it not discovered sooner? If the discovery were not made until after the payment of the replevin bond, the inference would be, that Hunt had not been vigilant; unless he had satisfactorily explained, how he made the discovery, and why he did not make it sooner. Either branch of the dilemma, is fatal to Hunt's equity. If he made the discovery shortly after his return from the South, he ought to have filed his bill sooner than he did. If he did not make the discovery until after the satisfaction of the judg-

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ment, he has evinced a passiveness which must be fatal to his claim to equitable assistance. "*Vigilantibus non dormientibus, servat lex,*" applies more emphatically to motions or bills for new trials, than to any other class of cases. It does not appear that there were no other witnesses except those said to be discovered after the trial, nor that any pains had been taken to find witnesses; nor that Hunt did not know of the unsoundness before the trial. These allegations would all be necessary.

But there are still other and stronger objections.

2. The alledged discovery is not of *a new matter* of defence, but of *additional evidence* in support of a *fact put in issue and tried by the jury.* For such a cause, a new trial ought not to have been granted by the Judge who tried the case. There would be no end to trials, nor any certainty in their results, if new trials should be granted on the allegation of a discovery of new witnesses, to prove a fact, in the knowledge of the party and in issue, on the former trial. Such a practice would subserve purposes of fraud, and encourage by indemnity, every species of carelessness and inattention in the preparation of suits. Hence it is not tolerated. On this point, the bill is radically defective.

3. The excuse for not being prepared fully on the trial is unsatisfactory. Absence on private business, has never been held sufficient, of itself, to authorize a new trial. If a litigant shall deem it more profitable to embark in an adventure of speculation, or to devote his attention to other private concerns, than to attend to the preparation and trial of his suit, he must submit to the consequences of his voluntary election. Those who engage in the exportation of the stock and of the surplus products of our State, deserve all the favor which any other class of citizens receive or have a right to expect. But neither the principles of law, nor of justice, nor of public policy, could permit it to be established as a general rule, that absence from court, on private business to the South or elsewhere, should entitle the absentee to a new trial in any case which may have been tried in his absence.

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SANDERS, &c vs. OUTTEN.

Besides, in this case, Hunt left agents at home to attend to his suit; if he did not, he ought to have done it; and it was his duty to give them instructions and information of all the facts in his own knowledge, which might have become material to his defence. Nothing of this kind appears in the bill. Even if the excuse for absence were sufficient, it should appear that his presence would have made a material difference in the result; 1 Marsh. 351.

The chancellor may direct a new trial at law, (whenever a case is presented in which the common law Judge would grant it,) provided, satisfactory reasons are shown for failing to make the application at law.

But in this case, if the application had been made to the Judge in proper time, he could not, consistently with established principles, have granted a new trial; a *fortiori*, the chancellor should forbear; and the excuse for not being ready on the trial, and for not then moving for a new trial is entirely insufficient; and if it were not, the other objections are insuperable.

Wherefore, the decree is reversed, and the cause remanded with instructions to dismiss the bill.

Caperton, for plaintiff; *E. Smith*, for defendant.

PETITION, &c

Sanders and Williams vs. Outten.

Case 127.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Replevin bond. Petition and summons. Nonsuit. Discretion.

June 13.

Judge ROBERTSON, delivered the opinion of the Court.

Petition and summons sustained on replevin bond.

A REPLEVIN bond is for the direct payment of money. Therefore, a petition and summons may be maintained upon it.

The court of appeals will not interfere in cases when the circuit court has a discretion, unless exercised with

The circuit courts exercise a sound discretion in directing nonsuits for lack of vigilant prosecution. They have a like discretion to reinstate causes in which nonsuits may have been directed. In the exercise of this discretion, this court will rarely interfere. The effect of setting aside an order for a nonsuit, is only to give the plaintiff an opportunity to try his case. It can seldom, if ever, do injustice to the defendant

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And, therefore, the circuit court will not be controlled, unless it has reinstated a cause under such circumstances, as will show flagrant injustice to the defendant. No such circumstances appear in this case. JOHNSON vs. WILLIAMS. manifest injustice.

All the other errors complained of, are obviated by the case of Salter and Stapp vs. Richardson, 8 Monroe, 204.

Judgment affirmed with costs and damages.

Sanders, for plaintiff; *Dana*, for defendant.

Hoofman vs. Sharp.

COVENANT.

Appeal from the Nicholas Circuit; H. O. BROWN, Judge. Case 128.

Covenant. Evidence. Performance. Special plea. Non-performance.

Judge ROBERTSON delivered the opinion of the Court. June 13.

THE only issue in this case being covenants performed, the proof offered by the defendant below, (plaintiff here) could not, on any hypothesis of its character, be relevant. It could not sustain the plea. That could be done only by showing a sufficient deed, executed in proper time. No excuse for non-performance, is admissible under an issue of performance. If there be any good reason for not performing a covenant in writing, it must be pleaded. Plea, covenants performed, no evidence admissible except to shew performance; any excuse for non-performance, must be specially pleaded.

We perceive no error in this case, wherefore, the judgment is affirmed.

Thornton, for appellant; *Depew*, for appellee.

Johnsons vs. Williams.

PETITION, &c

Error to the Boone Circuit; H. O. BROWN, Judge. Case 129.

Failure of consideration. Rate of interest in another state. Jury.

Judge ROBERTSON, delivered the opinion of the Court. June 13.

THE plea impeaching the consideration is insufficient. It does not show a *total failure*. Plea, failure of considera-

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HENDERSON vs. RICHARDS.

But the court erred in rendering judgment for interest on the note, without a jury to ascertain the amount. The note is executed in Cincinnati. Without deciding whether, judicially, the court can know that there is no place in Kentucky called Cincinnati, it is sufficient in this case that the plea states, that the note was executed in consideration of pork sold "*at Cincinnati, in the state of Ohio.*" The demurrer to this plea admits this allegation. It does not necessarily result that the note was executed in the state of Ohio. But we have no doubt, from the foregoing facts, that it was. The rate of interest in Ohio, is a fact which must be ascertained by a jury, on proof.

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The rate of interest in another state, is a fact which must be found by a jury.

Wherefore, for this error alone, the judgment is reversed, and the cause remanded for further proceedings, according to this opinion.

Triplett, for plaintiff; *Marshall*, for defendants.

ASSUMPSIT.

Henderson vs. Richards.

Case 130.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Independent promises. Allegata et probata.

June 13.

Judge ROBERTSON delivered the opinion of the Court.

When promises independent, not necessary to right of action, to aver performance. Tho' "*allegata et probata*" may not exactly concur, if such identity as to preclude an action, for the same cause sufficient.

THIS was an action of assumpsit, on the promise of Richards, that in consideration of an agreement by Henderson, to dismiss a suit, then pending in his favor, against Richards and wife, for a debt due by the wife before marriage, Richards would pay him $50, execute his note for an additional sum, and re-deliver to him sundry bonnets, which it seems the wife had received from him (Henderson). The note was executed and the $50 paid, when the assumpsit was made. But the bonnets were not delivered, and for this failure this suit was brought.

It is very evident, from all the facts, that the promise to dismiss the suit, and that to deliver the bonnets, were independent. The dismission of the suit was not a condition precedent to the delivery of the bonnets. The latter were to be delivered *instanter*. The promise to dismiss, and not the actual dismission, was the consideration. If Henderson had failed to dismiss

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his suit, and attempted to prosecute it in violation of the agreement, Richards, by performing, on his part, had a clear and full remedy. It was not, therefore, necessary to aver or prove that the suit was dismissed before the writ, in this case, issued. HENDERSON vs. RICHARDS.

Nor was a demand of the bonnets necessary. But if it were, the proof that Richards said he had determined not to deliver them, rendered it unnecessary to prove any demand.

None of the counts in the declaration are exactly correspondent with the evidence. But when all the facts are weighed, the promise set out in the declaration and that proved, can be so far identified as to leave no doubt that a judgment on one would be an effectual bar to a suit on the other. The apparent difference, therefore, between the "*allegata et probata*," as to the bonnets, is not material. The court, therefore, erred in instructing the jury as in case of a nonsuit.

Wherefore, the judgment is reversed, the verdict set aside, and the cause remanded for a new trial.

Triplett, for plaintiff; *Monroe*, for defendant.

The counsel for Richards presented the following petition for a re-hearing.

Petition for a re-hearing.

It may appear, "from all the *facts*, that the promise to dismiss the suit, and that to deliver the bonnets, are independent;" but it is presumed the facts here meant, are those which were stated by the witness, in evidence; and that the allegations in the declaration are not referred to as the facts. But the promise to deliver the bonnets is not declared on as an independent promise. On the contrary, the agreements on the part of plaintiff and defendent, are stated in every count of the declaration, as promises to be performed at one and the same time, and are, therefore, concurrent, and consequently dependent. No time is stated by the plaintiff, in his declaration, when he was to dismiss his action; and no time is stated when the bonnets were to be delivered; therefore, neither could hasten the other before he had first performed himself. It is supposed that this is plain law. If Henderson were to agree to pay me $100 to argue a cause for him in the Franklin circuit, nothing being said of the

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HENDERSON vs. RICHARDS.

Petition for a re-hearing.

time of the payment or argument, he would think it strange to find himself sued at the next court for the fee. If I were to die before I argued his cause, my executors could not recover even on a bond for the money, payable presently, if met by a plea to the consideration. If I were to call at his store and examine the sample of a package of goods he had on the way from Philadelphia, and agree to take them at a certain price, I do not believe he would think of sueing me for the money, till the goods arrived, and he offered to deliver them. If the goods were present in the house, he could not recover the price without any offer to deliver them to me. The payment of a part of the price, or performance in any other form, of a part of the consideration, by one of the parties, does not, cannot increase his obligation to perform the balance, or rather create an obligation on him to perform the remainder of his undertaking, before the other party may have performed or offered to perform on his side. The declaration states an agreement of the parties to perform concurrently, and consequently, their promises were dependent. The case proved is a case of independent promises, as stated by the court. The case stated by the witness is given the character of independent promises, by the fact that the bonnets were to be delivered immediately; and that, from the date of the agreement, the suit could not be dismissed till the next term of the court; neither of which facts appear in the declaration. The dates given in the counts are immaterial, and no time is given in any count, for the performance on the part of either; and, therefore, if one was to be performed presently, so was the other. The fact is, the plaintiff has treated the promises to dismiss the suit and deliver the bonnets as dependent throughout all his counts, and attempted, in every one, to aver performance on his part.

If, then, dependent promises are different from independent, the *allegata et probata*, have not here corresponded. Another variance is found, which must be insuperable. The declaration is, that the consideration was the agreement to dismiss a suit in the name of *John* Henderson, for the use of Charles Henderson, and the proof is of a suit in the name of *Charles* Henderson, for the use of Charles Henderson.

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Petition for a re-hearing.

I still think the declaration is for the failure to deliver bonnets, without identifying them of a certain value, and that the proof is, the agreement was for 23 certain, individual, identical bonnets, being the same which John Henderson had before sold to defendant's wife. This distinction is a very material one. The bonnets spoken of by the witness are, we suppose, not worth the candles this suit has cost. They were old, unfashioned, unsaleable bundles of straw, which John Henderson had deposited with this woman to be sold, and which this man, Charles, afterwards attempted to impose on her. They would have been returned, but they were seized by a constable under an execution against John Henderson, whose property they had ever been. These things are mentioned only to illustrate the materiality of the difference between the averment and the proof. The difference between the count and proof must always be material, where the measure of recovery would be different, in consequence of the different objects or subjects of the counts and proofs; or where a defence could be made, against the case shown, on proof which could not be made against that stated in the count.

The question of variance, on the plea of former decision, is of course, always the same, as might have been made on the evidence, upon the first trial.

To which the court, by Judge Robertson, returned the following response.

The counts in the declaration, and the proof, substantially correspond. A judgment in this case will bar any other suit for the same cause of action.

The promises were not mutual and dependent. The agent of Henderson, swore that he settled with Richards for Henderson, and says "*he came to the agreement with Richards, that the suit was to be dismissed*; that the said Richards then paid $50, and gave his note for $40, and agreed *to go and return them* (the bonnets) IMMEDIATELY." The suit could not be dismissed until court. Court was not then sitting. The witness swears that a few days after this agreement, he saw Richards and spoke to him about the bonnets, when the defendant informed him that it was not in his power to deliver the same; and on the same day afterwards

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WILSON vs. KILBURN.

this suit was brought." The suit was brought on the 14th day of February, 1825. The Franklin circuit is held in March, June and September, so that it is impossible, on this proof, to consider the promises mutual and dependent.

As to the difference between a suit brought in the name of John Henderson, for the use of Charles Henderson, and one in the name of *Charles* Henderson, for the use of Charles Henderson; we might admit, that this is as strong an objection to the opinion which has been rendered, as any other which is taken. The declaration describes the suit which was pending, and which was to be dismissed, as one in the name of John, for Charles; the witness, in describing it, says, Charles, for, Charles. We suppose that both meant the same suit. More need not be said.

Petition overruled.

CHANCERY.

Wilson, &c. vs. Kilburn.

Case 131.

Error to the Rockcastle Circuit; JOSEPH EVE, Judge.

Usury. Commonwealth's paper.

June 13.

Judge ROBERTSON delivered the opinion of the court.

If lender risks his principal, upon a contingency, as the appreciation or depreciation of depreciated paper, and there is no trick or device, a contract for more than six per cent., and the principal, in the depreciated paper, no usury.

KILBURN loaned to the plaintiffs in error, $37 50 cents, in specie, (when the paper of the bank of the commonwealth was at a depreciation of "*two for one,*) for which they executed their note to him, for $90 in commonwealth's notes, payable one year after the date.

Kilburn recovered a judgment on the note, for $90 in commonwealth's paper.

The plaintiffs obtained an injunction on the allegation of usury, which injunction was dissolved on the bill and answer. And the only question presented by the record, is, whether the contract was usurious.

No one shall reserve more than six per cent. for the loan to another, of money; nor for the loan of property, more than six per cent. on the *specie value* of the property, *at the time of the loan.* Hence, if $100 in commonwealth's paper be loaned, when it is "*two for one,*" and the borrower agree to pay for it, in a year,

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$100 in specie; this is usurious, because more than six per cent. is reserved for forbearance, the amount loaned being only $50 in value.

But if, when the paper currency was in the progress of depreciation, a loan had been made of specie, to be refunded at a future day, in depreciated paper, of greater value, *at the time of the loan*, than the principal and legal interest, this would not necessarily be an usurious reservation.

The lender risks the prospective value of the paper. This value is variable and contingent. It is the subject of speculation. If the paper continue to depreciate, until the loan become due, the lender will loose, perhaps, the interest, and a portion of the principal. If it appreciate, he may gain. He hazards the consequence. No one could decide, when the loan in this case was made, that it was, or would be, usurious. If it were not usurious when the note was executed, it could not be made so by any subsequent events, over which the parties could have no control. At the time of the loan, the paper value of $37 50 was $75. If, in one year, the paper had depreciated only 25 per cent., the lender would have lost by the loan.

"Contracts, depending on contingencies, real and not merely colorable, may secure more than legal interest, without coming within the definition of usury, or violating the spirit of the law. Because, in those cases, there is a *risk;* and as there might be a loss on the one hand, so on the other, there *may* be a gain." Heytle vs. Logan, 1 Mar. 531. "When there is a hazard that the plaintiff may have less than his principal, it is no usury." 7 Ba. Abr. tit. usury, D. See also Spencer vs. Jansen, 1 Atkins, 301.

There is no evidence, that there was any device or indirection in this case, to elude the statute against usury. And it cannot be reasonably inferred, that there was any such design.

It is clear, therefore, on principle, as well as authority, that the contract in this case, is not usurious.

Wherefore, the decree is affirmed, with costs and damages.

Triplett, for plaintiff; *Caperton*, for defendant.

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MOTION.

Fulkerson vs. Caldwell.

Case 132.

Error to the Mercer Circuit; WILLIAM L. KELLY, Judge.

Replevy bond, at whose motion to be quashed for want of summoning all the defendants in execution.

June 13.

Judge UNDERWOOD delivered the opinion of the Court.

A replevy bond, executed by a part only of the def'ts. in an execution, may be quashed on motion of plaintiff, but not on motion of obligors in the bond.

SINCE the case of Skinner, &c. vs. Robinson; Hardin 4, it has been the settled law, that where a judgment was rendered against two or more, and a replevin bond was taken, leaving out one of the defendants in the judgment, the plaintiff in the judgment may have the bond quashed, on his motion. In Edwards vs. Greenville, Hardin, 188, it was decided, that where a part of the defendants, in a judgment, replevied it, they could not avoid the replevin bond, and this has since been regarded as settled law. Waiving the question, whether it would be competent for the legislature, by any system of replevins, to compel a creditor, without his consent, to abandon his remedy against any one of his debtors, it may be safely affirmed, that the correct practice is, that the execution should conform to the judgment, and the replevin bond to both. If one defendant is omitted in the replevin bond, the creditor's debt is not so safe: He may justly complain of it, in the absence of positive law, requiring that he shall be content, and for that cause may quash the replevin bond. An act of 1802, limits the time within which motions to quash faulty replevin bonds shall be made. The motion in this case was made in time. John Neff, against whom judgment had been rendered, not having been included in, and made a party, to the replevin bond, gave Fulkerson a right to quash the bond. The circuit court should not, therefore, have overruled his motion, but should have quashed the replevin bond.

Judgment reversed, with directions to quash the replevin bond. The plaintiff must recover costs.

Richardson, for plaintiff; *Daviess*, for defendant.

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Shackleford vs. Morriss.

CHANCERY.

Error to the Bath Circuit; SILAS W. ROBBINS, Judge.

Case 133.

Usury. Assignable notes. Purchaser. Loan. Interest. Commonwealth's bank notes.

Judge UNDERWOOD, delivered the opinion of the Court.

June 13.

MORRISS purchased two notes, which Shackleford executed to Barbour, who sold them at a considerable discount. The object of Shackleford and Barbour was, to raise money on the notes for Shackleford's use. Morriss was not informed of this, when he bought the notes. Shackleford files his bill, stating that the scheme between him and Barbour, has tainted the transaction with usury, and that he ought not to be made account for more than the sum paid by Morriss for the notes. Not so. Morriss did not *lend* money, he purchased *choses in action*, made assignable by statute, and constituting an article of traffic. There is no usury in it. Afterwards, the notes were renewed, and then usury was reserved at the rate of 12 1-2 per cent. Shackleford has paid about the sum due for legal interest, and no more. It is objected, that notes on the bank of the Commonwealth, when loaned, do not bring an interest, and that notes of hand or bonds, payable in bank notes, do not bear interest. This might be true, if there was no express contract, but here is an express contract to pay interest; more has not been paid than ought to be paid, and there is, therefore, nothing to credit the judgment at law with, and there was no cause for the injunction.

The purchase of an assignable note, at a discount, not usury; there must be a lending and a reservation of interest, greater than six per cent. per annum: an express contract to pay interest, on a contract for bank notes, binds to pay interest.

Decree affirmed, with costs.

Brown and *Loughborough*, for plaintiff.

Hays vs. May's Heirs.

CHANCERY.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 134.

Interlocutory Decree. Practice.

Judge UNDERWOOD delivered the opinion of the Court.

June 13.

A DECREE directing defendants to convey to the complainant by a given day, "a tract of land containing acres of good quality, well

An interlocutory decree is always un-

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HAYS vs. MAY'S H'RS.

der the control of the court rendering it. Not error to set it aside and permit answer to be filed. When any act is ordered to be done, before the decree can be rendered certain or effectual, it is interlocutory.

watered and timbered, and fit for cultivation; lying in the boundaries of Nelson, Jefferson or Fayette counties, in 1785, if in the power of the defendants to do so out of any lands descended to them, and if not, then a jury to be empannelled on the 10th day of the next term of the court, to assess the damages sustained by the complainant, on the non-performance of a certain contract," &c. and concluding by stating that the damages so to be assessed, "shall be paid by the heirs out of any *assets* in their hands, or coming to them, as heirs, within thirty days, after the assessment; and if not so paid, then the complainant to be permitted to coerce the same, by execution, according to law, against the estate of John May the ancestor," is either a nullity, or merely interlocutory, and declaratory of the principles which shall finally settle the controversy. So far as it pretends to direct a conveyance, it is a perfect nullity; because, it does not settle or ascertain any thing. It holds out the idea, that the defendants may discharge themselves from damages by a conveyance of acres of land of good quality, &c. Who is to decide how many acres shall be conveyed, and who is to determine its quality, *whether it is well watered*, &c.? And yet according to the decree, if the defendants do not satisfy this absurd previous condition, they are to pay damages. And it is now contended, that the declaration that they shall pay damages, in case they fail to comply with the decree, in respect to the conveyance, is final, and that the court cannot open the case in any respect, but must go on and assess the damages and make the defendants pay them. We cannot admit it. Damages cannot be finally decreed, until the amount is rendered certain by assessment. Until then, the court can only lay down a principle which may be changed at any time. If laying down a principle merely, by which the cause should be ultimately disposed of, rendered decrees final in every instance, half the interlocutory decrees in our courts would be converted into final sentences. The above decree did in fact decree nothing finally, because nothing had been finally settled by the court. It is not like the cases of Watson vs. Thomas, Select cases 248; Same vs. Same, 2 Litt. 258, and Field vs. Ross's executors, 1 Monroe, 133. In these cases the court had reduced to certainty the

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rights of the parties, and adjudicated on them and had nothing more to do than to see that their decrees were carried into effect. There were no conditions, no damages to be assessed in *futuro*, and no doubt or difficulty as to the extent and meaning of the court. This case is widely different, and therefore, it was proper to set aside the unmeaning decree, if it deserves the name of a decree, and to permit the answers to come in. We perceive no error.

BANK OF KY. vs. BARNETT.

Decree affirmed, with costs.

Triplett, for plaintiff; *Crittenden*, for defendants.

Fleming vs. Campbell.

PETITION, &c

Error to the Woodford Circuit; W. L. KELLY, Judge.

Case 135.

Petition and Summons. Statute.

Judge UNDERWOOD, delivered the opinion of the Court.

June 13.

AN action by petition and summons, cannot be sustained upon a covenant to pay "*one hundred dollars in United States notes on the Bank at New Orleans*," because the provisions of the statute giving the remedy and the adjudications of this court, as to the class of cases not embraced by the act, exclude the present. Bank notes are not money. The summary remedy by petition is confined expressly to notes or bonds for the *direct* payment of *money*. See Loudon vs. Kenney, 1 Bibb, 330; Chambers vs. George, 5 Litt. 335.

Petition and summons can only be maintained upon notes or bonds, for the direct payment of money. Bank notes not money.

Judgment reversed. The plaintiff must recover his costs.

Haggin and *Loughborough*, for plaintiff.

Bank of Kentucky vs. A. M. Barnett.

DEBT.

Error to the Madison circuit; GEORGE SHANNON, Judge.

Case 136.

Payment at the day. Privilege. Commonwealth's bank paper.

Judge ROBERTSON delivered the opinion of the Court.

June 15.

BARNETT would not be entitled to the privilege of paying off his note in Commonwealth's

The bank of Ky., not com-

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Lewis vs. Hoover.

paper, unless he had done, or offered to do so, on the day. The note is for dollars, and gives him the right to discharge it in bank paper, only on the condition of his doing it on the day it falls due.

compelled to receive paper of the bank of the commonwealth from her debtors: the privilege to make such payment, ends with the day the note is payable.

It is not a note for paper, nor for specie or paper, in the alternative. Having failed to avail himself of his privilege, Barnett now has no right to pay in paper. Wherefore the court erred in giving judgment for the value of the paper.

It is, therefore, considered by the court, that the judgment of the circuit court be reversed, and cause remanded.

Turner, for plaintiff; *Caperton*, for defendant.

Detinue.

Lewis vs. Hoover.

Case 137.

Appeal from the Jessamine Circuit; W. L. Kelly, Judge.

Detinue. Assumpsit. Trover. Contract. Bailment. New trial. Affidavit.

June 15.

Judge Robertson delivered the opinion of the Court.

Statement of the facts.

This is an action of detinue, by Hoover vs. Lewis, for a promisory note, for $500 in commonwealth's paper.

It appears from the testimony embodied in a bill of exceptions, that Hoover held a note on Lewis, for $500, payable in notes of the bank of the commonwealth; that Lewis had proposed to execute another note for $525, in the same kind of paper, in lieu of the $500 note, with certain gentlemen as his securities, which Hoover agreed to accept, whenever it should be delivered to him with all the signatures; that Lewis signed the note for $525, and left it with Hoover, taking the note for $500 with him, on a promise to procure the signatures of the securities, to the other note. It was agreed, that if he did not cause the note for $525, to be fully executed, within a specified time, he should return the note for $500. He failed to complete the execution of the note for $525, and then refused to surrender the other. Whereupon this suit was instituted to recover it.

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The jury, on the general issue, found a verdict for Hoover. Lewis made a motion for a new trial, on an affidavit, which the court having overruled; judgment was rendered on the verdict for Hoover.

Lewis vs. Hoover.

Verdict for plaintiff.

It is insisted here, that the action was not maintainable; and that if it were, the court ought to have awarded a new trial, for the reasons stated in the affidavit.

There can be no doubt, that an action of detinue will lie for a deed, note, or any other muniment of title, or document of debt.

Detinue may be maintained for a deed, a note or writing, evidencing a debt, for any chattels which can be identified, to which the pl'tff. has a right of property, and of immediate possession, no matter how the def't. obtained possession.

Has the plaintiff property in the thing? Has he a right to the immediate possession of it? Can it be identified? Is it in the possession of the defendant? These are the only inquiries which it is necessary to answer affirmatively, to entitle the plaintiff to maintain a suit, in detinue. If all these facts concur, the plaintiff must succeed. They are all abundantly proved in this case. But it is suggested by the counsel for Lewis, that the action is misconceived. He insists, that as Lewis obtained the possession of the note, with the assent of Hoover, and promised to return it on a certain contingency, the only remedy for a breach of this contract, is assumpsit. There is no solidity in this argument. It is immaterial how Lewis obtained the possession, or for what purpose, if Hoover has a right to the note, and Lewis has no right, detinue may be sustained, and is the appropriate remedy for the restitution of the note.

"It lies *upon a contract* for not delivering a specific chattel, in pursuance *of a bailment on other contract.*" 1 Chitty, 118.

Pl'tff. may sue for breach of promise to deliver, when contract of bailment is determined, or he may bring detinue for the specific thing bailed.

A bailor may maintain detinue or trover against his bailee, of a chattel, after the contract of bailment shall have been fulfilled. He may surely, if he choose, bring assumpsit for a breach of the contract. But there can be no doubt that he can recover the specific thing bailed; and this he can do in detinue only.

It cannot be doubted, that if A pledge a slave with B, as a collateral security, for money to be refunded on a given day, he may recover the slave in detinue,

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Lewis vs. Hoover.

by paying or tendering the money on the day. He may also bring assumpsit or trover. In detinue, *it is supposed that the defendant had acquired the possession legally, by contract or otherwise.* Besides, Hoover had a right to treat the contract as a nullity. He had the option either to affirm it by suing for a breach of it, by Lewis, or disaffirm it by demanding his note.

If money be paid on a special executory contract, as soon as the contract shall be at an end, either by its own terms or by the acts of the parties, or either of them, *indebitatus* assumpsit may be maintained for money had and received. Comyn on contracts, 76–7, 81–2. In such a case, if property be advanced instead of money, detinue may be brought for it.

If A purchase from B a horse, to be delivered on a particular day, he may recover it in detinue, by paying or tendering the money, according to his contract. Noy's Maxims, 88; Shepherd's Touchstone, 224.

In such case, assumpsit will lie. But the plaintiff has his election to sue on the contract for damages, or to demand the specific thing which belongs to him.

We are not inclined to multiply illustrations. We would not have considered it proper, to admit that the question is open for argument, if it had not enlisted the zeal of counsel, in this as well as in the inferior court. There can be no doubt that Hoover had a right to his action, and that it is well sustained by proof.

Affidavit insufficient.

The affidavit discloses no good reason for a new trial. It does not state the names of the witnesses; that they had been summoned; or that if Lewis had been in court, he could have made proof, or shown sufficient ground for a continuance. These defects are fatal; but there are others equally so.

The court, therefore, decided correctly on the motion for a new trial.

Wherefore, the judgment is affirmed.

Haggin and *Loughborough*, for appellant.

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White's Executors vs. Guthrie and others.

CHANCERY.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 138.

Injunction. Damages. Practice. Credit. Dollars.

Judge ROBERTSON delivered the opinion of the Court.

June 15.

WE have detected no error in the calculation of credits by the circuit court. We would not feel authorised to reverse the decree for not perpetuting the entire injunction, or for not perpetuating a larger sum. But as the injunction was perpetuated for more than had been credited on the execution, the court ought not to have decreed costs against the complainants below.

When an injunction is perpetuated for more than is credited at law, it is error to give costs.

Nor was it proper to decree 10 per cent damages in gross, without ascertaining and decreeing the amount of those damages.

It is error to decree damages upon dissolution of injunction, without ascertaining the amount, specifically.

The decree itself, should shew the precise amount. It should not be left to the clerk to make the calculation. Such irregularities in the practice of some of the circuit courts should be corrected.

Decree reversed, and cause remanded for a decree to be entered conformable to this opinion.

Each party must pay their own costs in this court.

Upon a re-consideration, we are inclined to think, that as the creditor when he received commonwealth's paper, gave a receipt for the nominal amount for dollars, and as the case is a hard one against the plaintiffs, the payments ought to be considered as so much specie in discharge of an equal amount of the debt.

A payment made in depreciated paper. Credit given for dollars, determined, no deduction to be made for depreciation.

But as it is admitted that no part of Smith's interest has been paid, none of that should be enjoined.

Wherefore, the former opinion must be modified and the cause remanded for a perpetuation of the injunction for all except Smith's interest.

Denny, for plaintiff; *Crittenden*, for defendants.

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EJECTMENT.

Hodges vs. Crutcher.

Case 139.

Error to the Hart Circuit; BENJAMIN MONROE, Judge.

Evidence. Bill of exception. Title. Verdict.

June 15.

Judge UNDERWOOD delivered the opinion of the Court.

In an ejectment, if the record do not profess to exhibit the whole evidence, the admission of a deed as evidence, will not shake a verdict for pl'tff. tho' it might not have been strictly admissible; as had it been excluded, it would only shew the pl'tff. did not derive title thro' that deed.

THIS is an action of ejectment instituted against Hodges, in which Henry Crutcher, Robert Campbell and Frederick Woodson, were lessors of the plaintiff. Verdict and judgment for the plaintiff.

The whole evidence given in the trial is not made a part of the record. All of it that appears, is a copy of a deed, purporting to be from Frederick Woodson to Robert Campbell, the reading of which was objected to by the defendant, but overruled by the court. The assignment of errors questions the correctness of the decision of the court, in admitting said copy to be read as evidence.

Whether that copy should have been excluded or not, can produce no effect in the decision of the case. If it ought to have been excluded, it would only prove that Campbell did not derive title in virtue of it from Woodson; but its exclusion could not have proved that Woodson was destitute of title, and if he had title, the verdict and judgment were correct. There is nothing in the record, which negatives the existence of title in Woodson or Crutcher without the deed above; and unless the whole evidence was before us, it is impossible that we should be able to say that the plaintiff ought not to have recovered.

The judgment of the circuit court must, therefore, be affirmed. We would, however remark, that the authentication of this deed is not subject to the same objections as were brought before this court, in the case of Hunt vs. Owings, 4 Mon. 20; but we do not design deciding that the authentication of this deed is correct, as it is unnecessary to stir the question. The appellee must recover costs.

C. S. Bibb, for plaintiff; *Crittenden*, for defendant.

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Phelps vs. Hart.

ASSUMPSIT.

Error to the Montgomery Circuit; SILAS W. ROBBINS Judge. Case 140.

Indebitatus assumpsit. Consideration. Declaration. Allegata et probata.

Judge UNDERWOOD delivered the opinion of the Court. June 15.

HART declared against Phelps, in assumpsit, for money had and received to his use. He proved, among other things, that Robinson collected a replevin bond, to which he, Hunt, was equitably entitled, and that Phelps received part of the money from Robinson and took his note for the residue, and promised to acquit him of the demand. On trial, Phelps moved for an instruction to the jury, "that they could not find the amount of the note executed by Robinson in this suit, as it was not money." The court refused the instruction, and in that there is error.

Assumpsit for money had & received, can only be sustained for money; not for money & a promisory note.

In assumpsit the consideration must always be expressed in the count, and in regard to it the *probata* must agree with the *allegata*. Here the consideration alleged, was money had and received to the plaintiff's use. It did not embrace a note of hand not collected, taken by the defendant to himself from Robinson, who may have received money to plaintiff's use, and who retained a part and gave his note for it to the defendant, relying on his promise for acquittal. The court should therefore, have directed the jury to exclude the note from consideration, and not to find the amount of it for the plaintiff. The facts exhibited, show that although the plaintiff has misconceived the count so far as it respects the note executed by Robinson, he is not remediless.

Judgment reversed for this only error, and for new proceedings not inconsistent with this opinion. The plaintiff in error must recover his costs.

Turner, for plaintiff; *Denny*, for defendant.

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CHANCERY.

Honore vs. Colmesnil, and vice versa.

1jm 506 10 117

Case 141.

Cross writs of error to the Jefferson Circuit; J. P. OLDHAM, Judge.

Partners. Partnership. Profit and loss. Interest. Practice in chancery. Commissioner's report. Exceptions.

1jm 506 130 755

June 15.

Judge UNDERWOOD delivered the opinion of the Court.

The terms of partnership not reduced to writing, nor established by parol, the law implies equality of profit & loss.

THESE are cases relating to a partnership formed for the purpose of conducting a grocery and commission business, in the town (now city) of Louisville. At its formation the partners had great confidence in the honesty of each other, Colmesnil being the husband of Honore's daughter. At the period of filing the original bill, confidence had been supplanted by suspicion and mutual jealousy, and in the progress of the cause, a spirit of crimination and recrimination, whether well founded or not, is manifested, rarely equalled and perhaps never surpassed. Frauds of the blackest die in relation to the accounts of Colmesnil individually, and to the manner in which Colmesnil kept the accounts of the firm, are attributed to him by Honore, and in return Colmesnil charges Honore with bringing forward claims, and swearing to them, destitute of truth and justice. Unfortunately, the parties scarcely agree in any one important fact, and what is yet more unfortunate, their transactions are so enveloped in darkness, that it is nearly impossible for the court to elucidate them and to administer justice.

It is clear from the bills and answers, that in April, 1817, the parties entered into partnership under the style of John A. Honore and Colmesnil, for the purpose of doing business as grocery and commission merchants in Louisville, for an indefinite period. The terms of the partnership were not reduced to writing, and in relation to these the partners do not agree in any one point. Honore contends, it was mutually agreed that each partner was to contribute to the firm the whole of his monied capital, that profit and loss were to be apportioned according to the capital advanced, and that he was to have a reasonable rent for his store and warehouse, in which the business of the firm was to be transacted. Colmesnil states the terms

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of the partnership to be, that each partner was to contribute the same sum for the purpose of forming a capital, and that no specific sum was ever agreed on, that the profit and loss of the concern were to be equally shared and born, and that no rent was to be paid for the use of the store and warehouse, because the superior services of Colmesnil were estimated to be equivalent to the value of their rent. No deposition of any witness is filed, proving the terms of partnership, and in the absence of such proof, we are left to apply the rules of law, without any clear and satisfactory evidence which would enable us to determine whether the terms of the partnership have been truly stated, either by the complainant or defendant.

Had there been a written contract providing for the existence of the partnership, and defining the rights of the partners respectively, no difficulty could have arisen. In the absence of such a contract, and in the absence of all proof showing an express agreement by parol, "the partnership as regards its regulation, is governed by the contract implied by law, from the relation of the parties. Without an express agreement, the concurrent opinion of all the writers on the *civil* law, is, that the loss must be equally borne, and the profits must be equally divided." See Gow on partnership, 10. The same author proceeds to state a case in which Lord Ellenborough directed an issue to ascertain the interest of a son, whose father told him on his coming of age, he should have a share in the father's business; the son having acted as a partner between five and six years, leaving it to the jury to say, under the particular circumstances of the case, what was a fair proportion, and the jury only gave one fourth part of the profits. But Lord Eldon was dissatisfied with the result of this issue, alleging that, "as no distinct proportion was ascertained by force of any express contract between the parties, they must, of necessity, have been equal partners, if partners in any thing." There is nothing in this cause to induce a belief that a gratuity was intended, and we perceive no principle upon which to restrict either partner from claiming half the profits. But before these profits are divided, the capital of each partner and the debts and expenses of the firm must be deducted.

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HONORE vs. COLMESNIL & VICE VERSA.

Before we enter into the consideration of the accounts, there are several questions of law made in the progress of the cause, in the circuit court, which will be disposed of. Some of them are so intimately connected with the accounts, that they will be embraced in the consideration of the accounts. And,

The court has a discretion in admitting amendments to be filed in chancery; & unless that discretion be abused, to the injury of the party complaining, its exercise will not be disturbed.

1st. The complainant Honore filed his original bill in February, 1820, praying for a dissolution of the partnership, and a settlement of its affairs. On the 23d February, 1820, a decree was rendered by consent, dissolving the partnership and appointing a commissioner to divide the goods and wares belonging to the firm, between the partners. In May, 1820, the complainant filed an amendment to his bill; in August, 1821, he filed another, and in April, 1823, he filed another; to the filing of which last the defendant excepted. We are of opinion that the court correctly overruled the exceptions of the defendant. Filing amendments depend on the discretion of the court, and unless that discretion has been abused to the injury of the party complaining, this court will not control it. The matter brought forward in the amendment excepted to, is important, some of it had not been before exhibited, the complainant swore he had obtained part of it since his last preceeding amendment; the procrastination likely to result, was calculated to damage the complainant as much, if not more than the defendant, and in the settlement of extensive mercantile transactions, the business of years, it is not to be presumed that the parties can immediately lay their fingers on all important papers which may elucidate complicated accounts, and bitter controversies which grow out of them. Under these considerations, we cannot say that the court erred in permitting the amendment of April, 1823, to be filed.

Comm'rs. appointed to adjust the accounts of the parties.

2d. On the 26th of February, 1820, the court appointed commissioners "to examine and state the accounts, claims and demands of complainant and defendant, in relation to the copartnership and individually, and to report." By the order appointing commissioners, the parties respectively were to have access to the books and papers of the firm, either party was to be allowed to make explanations in regard to them, and to adduce evidence, written and oral, before the commissioners. The parties were directed to produce,

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on oath, all books and papers relating to the firm, and to lay them before the commissioners for inspection. The commissioners were authorized to examine the parties on oath, and to administer oaths to them.

HONORE vs. COLMESNIL & VICE VERSA.

On the 20th of May, 1820, the commissioners made their report to court, in which they state, among other things, that they had, after hearing witnesses, gone into an investigation of the accounts between Honore and Colmesnil, previous to the copartnership, and they proceed to state how those accounts stand in the ledger or book of Honore; and they say, from the books and papers exhibited, relating thereto, they cannot discover any material error. They proceed to state what appears on the book, to-wit: the execution of a note by Honore to Colmesnel, for $2252, payable 1st of June 1816, and the giving of a check by Honore in favor of Colmesnil, for $557 55, which was paid, they say, as per Honore's bank book, on the 18th December, 1815, and which, with the said note, balanced the account. They next speak of an account commencing November 14, 1815, entered in Honore's ledger, exhibiting a balance in favor of Colmesnil, for $283 49, which sum, with the amount of the note and interest, are brought into an account exhibited by Colmesnil against Honore, upon the settlement of which, on the 12th April, 1817, a balance is left in favor of Colmesnil, amounting to $1287 55, which, with interest up to the 26th January, 1820, making an aggregate of $1491 35, is credited to Colmesnil, and debited to Honore, on the books of the firm.

Accounts between the parties, prior to the partnership.

The commissioners then notice the firm transactions and say, that they have no means of ascertaining the stock of the parties, except from a stock memorandum book produced by Colmesnil and denied by Honore, from which it appears that Honore contributed, as stock, $6875 88, and Colmesnil $5037 59. They report a balance in favor of the firm, of $26,386 15; their examinations extending down to the 26th of January, 1820. From the condition of the books and in consequence of there being no stock, merchandize and other proper accounts opened and continued in the ledger of the firm, the commissioners say it is impossible to render a correct mercantile report. They present several accounts as the result of their labors.

Partnership transactions reported.

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HONORE vs. COLMESNIL & VICE VERSA.

Exceptions to comm'rs. report and cause heard.

In March, 1824, the complainant, with leave of the court, filed various exceptions to the report of the commissioners; and upon filing his exceptions, the cause came on for final hearing, and was heard at the same term, during which the exceptions were filed, but no decree was rendered until the ensuing term, when the court quashed a part of the report and affirmed the balance, with an addition for store and warehouse rent, omitted by the commissioners. The defendant, Colmesnil objected to the complainant's filing exceptions to the report of the commissioners, and being overruled, filed an exception to the opinion of the court. The ground of objection relied on by Colmesnil, is, that the exceptions came too late, and that in case they should be sustained, he would suffer irreparable injury from the death of one clerk and removal of another, who had testified before the commissioners.

No rule of law which precludes the court from hearing exceptions to the report of commissioner, or master in chancery, at any time, or of correcting or rejecting the report in whole or in part, even upon final hearing.

We are not apprised of any law which puts the report of commissioners beyond the revision of the court, at any time, when good reasons can be offered for calling it in question. We would not permit a report to be set aside, in part or whole, so as to prejudice the rights of litigants. Cases may happen, where a party relies entirely for success or defence on the matters reported, and would be surprised and subjected to entire loss, if he were not permitted, after seting aside a report, to strengthen his cause by taking depositions or by obtaining another reference to commissioners. In such cases, it would be the duty of the court, on the application of the party, to afford him an opportunity to take and present his proof and points relied on. But we cannot conceive a case where either party, as matter of right, can force the court to recognize an erroneous report, when there exists in the cause, evidence by which it can be corrected. As a matter of practice, we concede that circuit courts may establish rules, within which, parties shall be bound to except to reports; and if exceptions are not filed within the prescribed time, they may be rejected if offered thereafter. Even in that case, we are of opinion, that the court is not bound to consider the report as conclusive, but may disregard it, partly or entirely, if there be evidence showing that it is erroneous.

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The permanent master in chancery, known to the English courts, is unknown here. We, under an act of Virginia, (1 Dig. L. K. 226) have substituted in his place, a commissioner or auditor, *pro hac vice*. The object of the law, in providing for the appointment of the commissioner, is to save the time of the court, and it is his duty when appointed, to do those things, and those only, which are required of him by the order of court, and if he transcends the authority given him by the court, his acts are nugatory. This doctrine is recognized in the case of Saunders vs. Saunders's Executors. Littell's Select Cases, 10. The power conferred on our commissioners, usually exceeds that which the English master in chancery, by the rules of practice possessed; see Farmer and Arnold vs. Samuel, &c. 4 Litts. Reports, 190; Remsen vs. Remsen, 2 John. Chan. Rep. 495. Whether our courts can go so far, as to confer judicial power on a commissioner, has not been decided, and need not now to be made a question. In Bolware vs. Bolware and Weisiger, 4 Litt. Rep. 258, this court decided, that it was unnecessary to file exceptions where the report on its face is vague and uncertain. The case of Adams, &c., vs. Essex, &c., 1 Bibb, 152, only proves, that exceptions in this court, not made below, come too late. Prewett's executor vs. Prewett's heirs, 4 Bibb, 267, amounts to no more; and the case cited from 2 Hen. and Mun. 420, is of the same character. In the foregoing authorities, it not appearing that there was any rule of court violated, (and even if there was, it may well be doubted, whether such rule could divest the court of its power, in case it chose to exercise it,) we see nothing which renders the report of the commissioners too sacred to be touched, even on final hearing; and therefore, we are of opinion, that the exceptions of Colmesnil cannot avail him, so far as they relate to the time of filing the exceptions to the report.

Death of witnesses, whereby their testimony would be lost, no reason against setting aside an incorrect re-

The death of the witnesses, cannot change the principles of the law, and it may be remarked, that his affidavit, as to the facts he could establish by them, were they living, shews in part, at least, he has the depositions of others filed in the cause upon the same points. Moreover, he ought not to have failed taking the depositions of his witnesses while living. He cannot

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fasten an incorrect report upon his adversary by his negligence. We shall, therefore, proceed to inquire, whether the court did right in quashing any part of the report, and whether it was or was not proper to have disregarded it, and ordered a reference of the accounts to the same or a new set of commissioners, or whether the court should have proceeded to render a decree upon the exhibits and proofs filed, at the time of trial, without respect to the report, and what principles should have governed as applicable to the facts exhibited.

port of commissioner. The party should have taken their depositions.

It is perfectly clear, that much new matter was brought before the court by the several amendatory bills, and the answers thereto, after the commissioners had made their report; and this new matter, could not therefore, have been submitted to the consideration of the commissioners. We are of opinion, under such circumstances, that the investigations of the commissioners were premature, and that the court ought to have referred the accounts to the same or other commissioners, after all the new matter, and various contested claims of the parties had been exhibited; or if not, that the court itself should have sifted these claims, presented after the report, and allowed such as were supported by proof, and disregarded the others. It does not appear, that the court did either; on the contrary, the court made the report of the commissioners, the basis of its decree, after deducting largely from the sum allowed by the commissioner to Colmesnil, as stock. Thus the various claims set up by Honore, after the report, received no attention, or were disallowed by the court in silence.

If new matter be introduced in a cause, after commissioners have reported, the subject should be again referred, or the court should, itself, act upon the whole case thus presented.

We are of opinion, that the court was right in disregarding the memorandum stock book, as it is called; and that the commissioners were wrong in considering its contents as evidence against Honore, consequently, that so much of the report as was predicated upon the authority of the memorandum stock book should have been set aside. The court modified the report on this subject, by reducing the allowance to Colmesnil, and permitting that made to Honore, for his stock, to stand. Regarding the memorandum stock book, as no evidence, it leaves the settlement of the amount of stock, furnish-

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ed by each partner, as the most important question involved in the cause. We believe it has not been done upon correct principles, and hence the decree is radically erroneous.

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It is clear that the partnership was not formed, until April, 1817, after the return of Honore from New-Orleans, with a valuable cargo, in the barge Despatch. Upon the formation of the partnership, this cargo was delivered to the firm. Honore claims the proceeds of the sales of this cargo as his stock, and if it be allowed to him, he gets its value in Louisville, as fixed by the selling prices, subject to deductions hereafter to be mentioned. Colmesnil contends that Honore is only entitled to credit in his stock account, for the sums paid by him for the cargo in New-Orleans, and the expenses of transportation to Louisville; and if Colmesnil succeeds, Honore will be deprived of the increased value of the cargo in the Louisville market. It may be asked, who was the real owner of the cargo, on the arrival of the barge Despatch, in Louisville, in the spring 1817? It is certain, that Honore was. How then shall he be deprived of the value of the cargo, at that time and place? It is insisted, on the part of Colmesnil, that it is to be done upon an agreement between the partners; that the partnership, when formed, should relate back to the commencement of the voyage, by the barge. Is there any proof of this? It is not contended, that there is any positive proof of it; but it is said, that the circumstances render such an inference irresistable. Colmesnil admits in his answer, filed, 20th June, 1823, that although he and Honore had conversed upon the subject of forming the partnership before the voyage was commenced, yet the terms were not then agreed on, and that Honore, upon his return, might have refused to enter into the partnership. Under such an admission, the circumstances should be very conclusive, to justify the court in depriving Honore of the enhanced value of the cargo, in Louisville. According to Colmesnil's admission, he would not have been under any moral, much less legal oligation, to pay Honore any part of the loss, had the barge sunk, and the cargo been destroyed on its way up the river. As he would not have been

The amount of sales of the cargo of the barge Despatch, at Louisville, after deducting commissions and storage, not the prime cost & expense of transportation, established as the sum which is to be credited to Honore, in his stock account with Honore and Colmesnil.

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bound to sustain any part of such loss, if he is permitted to share in the enhanced value of the cargo, his claim is founded upon the supposition, that Honore intended that he should participate gratuitously.

The connexion and good feelings, which subsisted between the parties, at that time, and some other circumstances, presented in the brief of Colmesnil's attorney, furnishes some ground for such a presumption; but we think they are not sufficiently strong, to justify us in depriving Honore of the full value of his goods, at the time they were delivered over to the firm in Louisville, without his receiving any adequate consideration. It would protract this opinion, to a most tiresome length, were we to give all the reasons which operate, to render the circumstances relied on by Colmesnil's counsel, inconclusive, and we shall not attempt it. We rest satisfied, that we are promoting the ends of justice, by giving Honore, the value of the cargo in Louisville, at the time it was delivered to the firm; to be ascertained if practicable, by the sums for which it sold, according to the books of the firm, and if it cannot be so ascertained, then to be fixed by commissioners to be appointed for that purpose, who shall be authorized to examine the books, and hear additional testimony and evidence and report to the court.

The complainant filed a paper, purporting to be an account of the sales of the cargo, of the barge Despatch, amounting to more than $16,000, alleging that it was correctly taken from the books of the firm, and called on the defendant, to answer, whether it was not correct, and, if incorrect, to point out the particular errors.

The defendant in his answer, gave a general denial of the correctness of the account of sales filed by the complainant, but declined going into particulars upon the ground, that he was advised it was unnecessary. He adds that no account of the sales of said cargo was kept, and that it is impossible for him or any one else, to make out an account approximating the truth from any data on the books or in existence. If such be the fact, it results from a looseness in the transaction of mercantile affairs, which is believed not to be very common with skilful merchants, and it is somewhat sur-

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prising, that the allegation should come from the defendant who claims an exemption from rent, because of his superior skill and services to the firm, he being the partner relied on to keep the accounts. The addition of the letters or words "*&c.*, or "*and Colmesnil*," to the name of J. A. Honore was improperly made, whether under the advice of the commissioners or not, and we think it not improbable that the books of the firm under the examination of commissioners will enable them to ascertain, with tolerable correctness, the value of the cargo of the Despatch. If they should not, the commissioners must proceed as already indicated.

We also observe in the account filed, that there is a commission of $816 57, and storage amounting to $300, in all $1116 57, charged in favor of the firm on account of the cargo of the Despatch claimed by Honore. Such charges, if to be found on the books, cannot be justified upon any other ground, than that Honore was the exclusive owner individually of that cargo. As the individual owner, the charges are proper, and should be deducted from the proceeds of sales, and the balance left, Honore is entitled to, as capital put into the partnership trade. But it is difficult to imagine a sufficient reason for keeping a commission and storage account for goods owned by the firm, when it is said by the defendant that an accurate account of the sales were not kept. We are therefore, of opinion, that the court erred in fixing the amount of Honore's stock at $6875 88. as reported by the commissioners from the memorandum stock book.

Honore's stock in trade must be ascertained by the value of the cargo of the barge Despatch, to be estimated according to the prices received for it on sales made thereof by the firm, acting in the character of a commission house, deducting therefrom commissions and storage. Commissioners must be appointed to make the estimate, and in doing so, they are to have access to the books and papers of the firm; and if these are insufficient to enable them to ascertain the value of the cargo as aforesaid, they may receive such additional proof and evidence as the parties may offer. After deducting commissions and storage, to the balance left, must be added $1400 for the barge Despatch, and any other

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sums of money or the value of any other property, which Honore may satisfactorily prove before the commissioners he put into the concern as capital. The stock of Colmesnil must be ascertained in the same manner.

Whatever sums Colmesnil advanced from his private funds, in aid of the purchase of the cargo of the Despatch or its transportation, to be charged to Honore individually.

But as Honore is allowed the value of the cargo of the barge Despatch at Louisville, he must not be allowed any sums paid G. Musson for that cargo, nor can he be allowed any sums expended in the voyage in bringing the cargo to Louisville. For all sums paid by Colmesnil to Musson, or to others on his drafts; or to the crew of the barge Despatch; or for provisions and other articles out of his individual funds, which went to the use of Honore in paying for and bringing the cargo of the Despatch to Louisville, from the commencement to the termination of the voyage, Honore must be charged individually; and the commissioners will state and report to the court, such an account against Honore, in favor of Colmesnil, upon the proofs and evidences furnished by the latter. For all sums of money paid by the firm, on account of the cargo of the barge Despatch to Musson or others, an account must likewise be taken, and the amount thereof must be deducted from the stock of Honore, to be ascertained as aforesaid.

In ascertaining the rights of partners, the implication or inference of law, to be pursued, unless countervailed, by definite and satisfactory evidence.

The allowance to Honore of rent for his store and warehouse is correct. The terms of the partnership are not definitely established by any evidence, and consequently, we must decree that, which in the absence of satisfactory evidence, the law will imply. The firm had the use of Honore's store and warehouse. He should receive an equivalent for it. We do not find that equivalent in the superior services of Colmesnil. The unsatisfactory and defective manner in which the books have been kept, so that it is impossible according to the report of the commissioners fortified by other testimony, to make out from them a complete statement of the business of the concern, is a sufficient answer to his claim to be exhonerated from the payment of rent. The rent must be paid out of the profits of the firm.

A and B are

In regard to the barging business, in which Honore and Colmesnil were jointly concerned previous to the

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formation of the partnership, for the purpose of doing business as grocers and commission merchants, we look upon the settlement thereof, and the execution of the note for $2252, as conclusive, and that settlement should not now be opened, unless upon the most certain evidence of fraud or mistake. The length of time which has elapsed since the termination of that concern, would render it impolitic and dangerous to open the settlement of the parties, made at a time when mutual good understanding subsisted. We, therefore, deem it proper to allow Colmesnil the sum of $1491 35, reported by the commissioners in his favor. The court erred in not decreeing a surrender of the note for $2252, to Honore, on making the above allowance to Colmesnil.

engaged in barging, and have a settlement; afterwards, they form a partnership as grocers, & disagree: the settlement not to be disturbed, unless upon clear proof of fraud or mistake.

It was improper to have blended the accounts subsisting between Honore and Colmesnil individually, with the transactions of the firm, on the books of the firm; and we apprehend that it has been the cause of some confusion, and has rendered the accounts less intelligible.

Improper to blend individual and firm accounts

The accounts of each partner, with the firm, should be kept in the books of the firm; but the individual accounts between the partners, should be kept as separately as individual accounts between a partner and an entire stranger to the firm. Some of the accounts of Colmesnil, which he has entered to his credit as stock, seem to us to have been properly chargeable to Honore individually; such as those for provisions furnished the barge Despatch. In the reference again to be made to commissioners, they must state all such accounts as may be allowed by them as charges against Honore, individually.

In relation to the proceeds of 47 barrels of pork, $577 63, charged by Colmesnil, as part of his stock, it appears to us that it was bought for Honore, and that he designed paying for it through Fishli, but that Colmesnil, instead of applying the money received by him from Fishli, in payment for the pork, applied it in discharge of his own claims against Honore, who has never paid for or furnished funds to pay for the pork. Consequently, Colmesnil is entitled to the sum of

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$577 63, and it will make no difference whether it be charged against Honore individually, or whether it be deducted from his stock and allowed to Colmesnil as stock; one must be done, and the first is most proper.

Honore claims $640, as a payment made Musson for the cargo of the Despatch, being the proceeds of 64 barrels of flour. He will be allowed this in the ascertainment of the amount of his stock, according to the principles already laid down, but it is very doubtful whether it ought to be allowed him. Colmesnil contends that these 64 barrels of flour were joint property; if so, half of the $640 should be passed to his credit, and charged against Honore. There is such a want of proof in relation to this flour, that we cannot form a satisfactory opinion concerning it; and we shall, therefore, leave it to be disposed of by the commissioners who shall again pass on the accounts.

Lapse of time after a settlement, and a note given for balance due, a strong ground for refusing to look behind the settlement

We have already stated that the settlements of the barging business, as made by the parties, ought not to be molested. Honore charges Colmesnil with having collected various sums of money for him, and that Colmesnil was indebted to Honore various sums for advances, &c. for which he, Honore, received no credit in the settlement of the barging concern. All items charged by Honore against Colmesnil, of date prior to the settlement, we are disposed not to allow, because of the lapse of time, and the presumption arising from the settlement and the execution of the note against such items, when now brought forward; but for all moneys collected by Colmesnil for Honore, individually, and for all sums laid out and expended by Honore, for Colmesnil, since that settlement, and which he, Honore, can satisfactorily prove, before the commissioners to be appointed, we are of opinion, he should be allowed credit as a set off against the debt of $1481 35, allowed already to Colmesnil. We will not enter upon an examination of the various accounts brought forward by Honore; some of which, or items in some of which, probably ought to be allowed him as originating since the date of the settlement aforesaid. We shall leave them to be disposed of by commissioners; as also, the claims set up by Honore, upon the ground that Colmesnil has collected from the debtors of the firm, more money than he accounted for.

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We perceive no proper ground, upon which Honore was justified in charging Colmesnil rent, for the dwelling house of Honore. Nor do we see any ground, upon which Honore can be let in to share the real property acquired by Colmesnil. Nor can we discover, by considering these acquisitions, any rule by which we can ascertain, whether the funds of the firm have been improperly applied to these objects, by Colmesnil. These subjects need not, therefore, be further investigated. We cannot discover, in all the evidence relating to them, such a presumption against Colmesnil, as would enable us to render any decree in favor of the complainant.

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Honore not entitled to participation in the real estate, acquired by Colmesnil.

The pleadings in this cause, show that there were three negroes purchased of Beamon. The decree should have divided, or sold these negroes and divided the proceeds of sale, if it appears from the firm books that they were purchased on joint account, which we infer to be the case from the record before us.

It appears at one time, the firm owned horses, drays, &c. It does not satisfactorily appear, from any account filed or other paper, what became of the proceeds of their sale. From the foregoing view of this cause, it results that the court ought to have recommitted the accounts of the parties, for a report conformable to the principles here settled. It has not been done, it must yet be done; for in the condition of the accounts, as they now stand reported on, it is impracticable to render such decree, as will meet our ideas of law and justice. Upon the return of the case to the circuit court, that court will, therefore, make an order referring the accounts to commissioners, with instructions to report thereon, as required by this opinion; and that court will also give the commissioners power to hear and take evidence, which must be reported to the court, as well as the statement of the accounts.

In respect to the real estate, purchased for the partners, with the funds of the firm, as also the bank stock in the commercial bank of Louisville, these may be left to the control of the partners, each having the right to control his individual interest. We are of opinion that the funds of the firm, used in the accumulation of this property, were appropriated by the con-

Property acquired in the name of a firm, foreign to the objects of the partnership, must be inferred to have been

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sent of the partners; but we are not satisfied from anything appearing on the record, whether the funds used to acquire the turnpike stock, insurance stock, and pew in the meeting house, were appropriated by the consent of each partner, or at the instance of one only. It would be proper to infer a joint consent from the entries on the books of the firm, unless one of the partners can show his disapprobation, at the time of acquiring the property, or as soon thereafter as he was informed of its acquisition. In such case, as these were objects foreign to the purposes of the partnership, the objecting partner may compel him, so using the joint funds, to take the property acquired, and account for half the money appropriated for its acquisition. We will, therefore, leave this matter open for investigation, before the commissioners; and if, upon their report, the court shall be of opinion, that the whole should be considered joint property, it will be proper to order a sale of the pew, and a division of the money arising from the sale thereof, as the pew is not reasonably susceptable of division, without sale. A division of the different stocks, or sales, or permiting them to remain in *statu quo*, as may best suit the wishes of the parties, or views of the court, would not be inequitable.

acquired by consent of each partner, from the entries upon the firm books, unless it appear that one of the partners dissented at the time, or so soon as informed: in which case, the dissenting party, has a right to compel the party acting, to hold such acquisition as his individual property, and to charge him with the amount of purchase money.

It becomes necessary to point out other duties for the performance of the new commissioners, in consequence of other proceedings had in the circuit court, which do not meet our approbation. On the dissolution of the partnership, Isaac Stewart was appointed a commissioner to divide the stock of goods on hand, owned by the firm. He did so, and reported a small balance against Honore. Colmesnil was authorized to proceed and sell the goods on hand, owned by consignors, and was required to pay two fifths of the commission to Honore. Stewart made a list of these goods, and their value. It does not appear that this balance against Honore, and two fifths of these commissions in his favor, have been brought into the account, or settled in the decree, it must be now done.

If, upon the dissolution of a partnership one partner is

Colmesnil was authorized to collect the debts, and settle the open accounts of the firm with its debtors, after the dissolution. He was required to report his proceedings to the court, and did so. Commissioners

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were appointed in November, 1824, to examine the accounts of Colmesnil, to ascertain their correctness, and to report thereon. These commissioners state, that it appeared to them, that Colmesnil had received many debts in currency, and on that account, they take into consideration, the rate of exchange, and present a statement to the court, from which it appears, that in several instances, they have converted the currency with which they charge him, into specie, at the rate of discount fixed, and then placed the amount of the specie, to the debit of Colmesnil. We cheerfully grant, from the report of the gentlemen acting as commissioners, that they are excellent accountants, but we cannot concede to them, equal skill in legal science. When Colmesnil was appointed receiver and agent of the dissolved firm, although he had an interest, he was only trustee for Honore, so far as he was concerned, and as such trustee, he could no more accept paper currency, in discharge of a specie demand, without the consent of Honore, so as to effect his interest, than an executor or administrator could do the like, without the consent of the heir, devisee or distributee. If an agent were tolerated, to indulge a discretion on these occasions, it might lead to great mischief. The commissioners were, therefore, wrong in their estimates. Indeed, they acknowledge that the proportion of specie and currency, collected by Colmesnil, as agent, was fixed by a rule somewhat arbitrary, although the best which they could adopt, to accomplish their design. The account with Colmesnil, as agent, must be settled, by charging him, in specie, for the full amount of his collections, unless the debt or demand was payable in currency. If, however, he received currency, and paid specie debts with it, he should have credit for the nominal amount of the debts so paid. If he can show that he received currency, because he could not collect any thing else, in consequence of insolvency on the part of the debtor, that circumstance will be a good reason, why he should only be charged with the value of the currency, collected in such cases. This is conceded, not upon the ground that there is a discretion vested in the agent, to take currency for a bad debt, but upon the ground that it would be iniquitous in Honore, to claim

appointed to receive the debts due, & discharge the demands against the firm, he is trustee for the other partner or partners, and must be charged with the debts received, at the nominal amount as shewn, unless he shew that he received a less value, or made a composition, because of the insolvency of the debtor, & the impossibility of collecting more, unless the debts or demands were payable in a depreciated medium. If he pay off demands against the firm, in a depreciated currency, which he has received at its nominal value, at the same value, he must be credited by the nominal amount of the demand discharged.

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more than his share of the sum, which would be made by reasonable diligence, out of the debtor. The accounts with Colmesnil, as agent for the firm, must be settled in conformity with the principles here laid down. The claim of Honore, for a remnant of goods deposited with Colmesnil, is left in such uncertainty, that nothing can be made out of it. There is no eveidence to show their value, or proving that Colmesnil converted any part to his use. The charge that Colmesnil supported his family out of the firm funds or property, without entering to his debit, the money or property used, is of the same character. There is nothing in the record which will enable us to decide, whether he did so or not. We cannot decree upon surmises and possibilities.

When it appears that the books of a firm have been unskilfully or irregularly kept, comm'rs. appointed to adjust and settle the business of the firm, not confined to the books of the firm.

In addition to the duties already prescribed for the commissioners, we direct that they report, from an examination of the books and papers of the firm, the amount of profit, realized by the concern, the accounts of each partner, with the firm, for money or goods, charging each partner with any money or goods which he may have received, and which has not been entered on the books of the firm, to his debit. The commissioners will, in their report, likewise enlarge or diminish the profits to more or less than the sum warranted, by an inspection of the books and papers, so as to correct any mistakes in entries, or any omissions to make proper entries. This we conceive to be proper, because of the concurrence in the testimony, that the firm books have been kept in an unskilful and unsatisfactory manner. To accomplish these ends, the commissioners must be authorized to take and hear testimony, which they will also report. In like manner, the commissioners will report all such other accounts as may be necessary to a correct adjustment, understanding and settlement of the business of the firm.

Colmesnil to be charged with the sums received as interest, and not to be credited by interest on debts payed, after he had on hand the funds of the firm.

In settling the accounts of Colmesnil, as agent for the firm, it would be proper, not to allow him credit for interest, on debts paid for the firm, for time running after he had on hand sufficient funds of the firm, to pay the debt. He should be charged with all sums received for the firm as interest. If he collected any interest on the money due the firm, he is as much

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bound in conscience and law, to account for the interest as for the principal.

To the report made by the commissioners upon Colmesnil's accounts, as agent for the firm, exceptions were filed by both parties. The court made some allowances to Colmesnil, which were rejected by the commissioners. We do not perceive any errors in the additional allowances made by the court, unless it may be in the item for turnpike stock. That must be rejected, if it should be ascertained that the stock is not properly the property of the firm. The court did not allow all the claims set up by Colmesnil, regarding some of his vouchers as insufficient. To say the least, the rejected vouchers produce a strong impression that the firm will gain, and Colmesnil loose, individually, in consequence of these rejected claims. Therefore, on the reference to commissioners, he may strengthen his vouchers, by parol proof of their correctness, if he can produce any. Colmesnil had paid over to Honore, according to the commissioners' report, $2000, in notes on the bank of the commonwealth, in November, 1824. The commissioners gave Colmesnil cridit for $2000. The court, at the instance of Honore, reduced the credit to $1000, by ordering Colmesnil to pay Honore $1000 in specie, in addition to the $2000 in notes, upon the ground, that the notes, at the time of payment, were not worth more than that sum. Colmesnil objected, and excepted to this opinion of the court, and insisted that Honore should be compelled to restore the $2000 in notes, if he was required to pay $2000 in specie. In this exception, we think Colmesnil may be right. Honore, while asking justice, should be compelled to do it; if he voluntarily received the bank notes, without fraud or mistake, knowing for what they were paid him, and made no reservation at the time, on account of the depreciation of the notes, he should account for them at their nominal value. But if, at the time they were received, he stipulated that Colmesnil should not be allowed credit for more than their real value, then the court was right. From what appears, we are inclined to the opinion, that the court erred; but as the evidence is not clear, and has not been reported by the commissioners, who made the allowance of $2000

A party receiving depreciated paper, without objection, knowing its value and for what paid, must account for it, upon settlement, at its nominal value.

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to Colmesnil, we leave the point open for new proof, under the rules prescribed, when the cause is referred to new commissioners.

Upon dissolution of partnership, most regular to appoint a disinterested person, agent to close the concern; but, if partner appointed and he acts faithfully, he is entitled to compensation to be paid out of the funds of the firm. He is chargeable with debts lost by his negligence but is not chargeable for delay, if debts be still collectable, such agent is the ministerial officer of the court, and bound to act as ordered, & may be compelled to proceed to collect and close the business, or be superseded.

Colmesnil claimed compensation for his services, which was refused. Upon the dissolution of the copartnership, it would have been most regular, to have appointed a disinterested person, as agent, to collect and settle debts, and close the affairs of the concern. Such agent would be entitled to compensation for his services, without doubt. As this was not done, but a member of the firm appointed, there would have been no impropriety in making him compensation for his services, in case they were faithfully rendered, and no particular cause exists for refusing it. The court below must, therefore, make Colmesnil an allowance for his services, as agent for the firm, the whole to be paid by the firm, or half to be paid by Honore, if on consideration of the facts, under the above rule, they think him entitled. Honore endeavored to make Colmesnil account for all debts due the firm, not collected. It is true, that if debts are lost by the negligence of Colmesnil, acting as agent for the firm, such negligence would not only furnish a good reason for rufusing to pay him, as agent, but ought to render him accountable to Honore, for the loss sustained. But delay, merely in proceeding with the collection of debts, cannot have the effect of rendering Colmesnil chargeable with their amount, if they be thereafter collectable. As agent for the extinct firm, he is subject to the control of the chancellor. He may be compelled to proceed under orders of court, or he may be superseded by another appointment. This course we deem not regular; and if it shall finally appear, that any losses have been sustained by his negligence, it will then be proper to make him account for them. It may here be remarked, that the court should take an account of the uncollected and unpaid debts, due to and from the firm, and by superintending the agent, have the whole closed with all practicable speed. When a partnership has been dissolved, by decree of court, as this has been, and from the disagreements among the partners, it becomes proper for the court to appoint an agent, to wind up the partnership concerns, such agent is

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the ministerial officer of the court, for the occasion, and bound to perform the duties prescribed to him.

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We have thus laid down such principles, in regard to the accounts and the most important items, as will, we trust, by being observed, enable the circuit court to settle this perplexing controversy, according to right and justice.

Depositions taken without notice, to be rejected.

3d. Colmesnil has filed exceptions to the opinion of the court, overruling his objections to the reading of all depositions taken and filed by Honore, since the first reference of the accounts. We think the court was right in overruling his objections upon every ground, except that which alleges he had no notice of the time and place of taking the depositions. We have not deemed it necessary to examine each deposition and notice, to see whether any deposition can be found, taken without notice to Colmesnil. If there be any such on the return of the cause, Colmesnil must specify it, when that court must give leave to retake it. The exception in regard to want of notice, fires at the lump of Honore's depositions, in the hope of hiting some one. We are not disposed to consider it on account of its generality.

There are other exceptions filed on both sides, which do not deserve particular notice. There is nothing of importance in the cause, which does not fall within the operation of the plainest principles, or some rule or direction herein prescribed.

A decree should be definite and certain, and should, of itself, exhibit the extent of the recovery, and the amount, and should justify execution, without reference to the evidence, or to any thing extrinsic.

4th. The manner in which the decree has been rendered in this cause, is very objectionable and erroneous. It endeavors, by reference to a report which underwent considerable modifications, to ascertain the extent and amount of money which Colmesnil should pay to Honore. The maxim of "*Id certum est quod certum reddi potest*," should very rarely, if ever, be applied to judgments and decrees. A judgment or decree, upon its own face, should show what the court has decided. The paper referred to, is not spread on the record, and numerous evils might grow out of tolerating the practice of deciding causes, by reference to the evidence filed, instead of giving an authoritative decree defining clearly, what was required of the par-

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ties. On the decree in this case, no execution could issue. The clerk could not tell for what sum he should issue it, without exercising judicial power, upon the examination of the papers referred to. The consequence in this case, has been, that the court, on motion, at a subsequent term to that during which the decree was rendered, undertook to settle the amount for which execution should issue. For these errors, if no others existed, the decree would have to be reversed. After the cause shall have been prepared as is herein directed, the court must ascertain the amount due Honore, if any thing, and then decree for that sum against Colmesnil. If there are debts yet uncollected, it will be proper for the court to superintend their collection, requiring reports, from time to time, from the agent, and compelling him, by attachment, if necessary, to perform what the court shall require of him in respect to the collection of these debts, and the distribution and appropriation of the money when collected.

The decree of the circuit court is reversed, and the cause remanded for proceedings to be had in conformity to this opinion. And as the court erred in relation to both parties, the costs in this court must be divided.

Crittenden and *Marshall*, for Honore; *Denny*, *Nicholas* and *Duncan*, for Colmesnil.

The Counsel for Honore, presented the following petition, for a modification of the opinion of the court.

Petition for a modification.

The counsel for Honore, have carefully examined the opinion delivered by the court in this cause, and they are impressed with the belief, that it is not, in all respects, precisely correct. They beg leave respectfully, to submit such remarks and suggestions, as will recall the attention of the court to these particulars, in which they think that opinion ought to be altered or modified.

It must be very evident, that Honore's contribution of capital, to the partnership stock, greatly exceeds that of Colmesnil. And the question becomes an interesting one, how the profits are to be divided? Are they to be distributed equally, or rateably, according to the proportions, in which the partners have contributed?

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It would seem to result from the first principles of the doctrine of *meum* and *tuum*, from *natural* equity, that profit, which is the proceeds of capital, should be distributed, in proportion to the capital of the parties. So is Mr. Watson's opinion. See his work on Partnership, 1–42. But Mr. Gow, in his work on the same subject, and in the passage cited by the court, says, that in all cases where the division of profits is not otherwise provided for, by the positive agreement of the partners, they "*must be equally divided*," according to the "concurrent opinion of all the writers on the civil law." We have, however, in the very next sentence, the opinion of Mr Gow, that it is "questionable" whether this be the doctrine of the law of England, the law which must determine this case; but Mr. Gow is mistaken; "all the writers on the civil law" do not concur in laying down its doctrines on this subject, as he does. On the contrary, all that we have had an opportunity of referring to, hold a different doctrine, and advocate a distribution of profits "in *proportion* to the shares advanced by each contributor."

This is the doctrine of the civil law, as laid down by Brown, by Pothier, and by Kent. See 1 Brown Civil law, 379; 3 Kent's Commentaries, 7, and the reference there given to Pothier. But it is not so much our purpose, to contest the general rule of law, laid down by the court on this subject, as to shew, that there are facts and circumstances in this cause, which render that rule inapplicable. That general rule is, that where the parties have been silent and made no agreement to the contrary, that the profits of a partnership, are to be equally divided among the partners, though their shares of contribution, may have been very different and unequal. Upon reason, and authority, the rule is very questionable. If it can be maintained, it must be on the ground, that the partners having *agreed* to unite, and having *agreed* to *unequal* contributions of capital, and on *that basis* to form a *partnership*, must, *ex vi termini*, be *understood*, in law, as agreeing to an equal division of profits; if they make no stipulation to the contrary. So that the inference, or rule of law, which entitles the *minor* contributor, to an *equal share* of profits, is predicated upon the *assent* or *agreement* of his partner, *implied* or *express*, to admit

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him into the firm, and into an equal participation of profits, upon those terms. Various extrinsic circumstances, or considerations of bounty, or of interests may enter into the minds of parties, in forming such associations; may compensate for any inequality in their pecuniary contributions, and may induce one partner to admit another, to equal profits, though unable to make contribution of an equal amount of capital. And hence, the law, whose tendency and principle, is perfect equality, and reciprocity, will not depart from it in such a case, as it respects the profits of a partnership, but in conformity to some positive agreement of the parties. Every consideration, of the reasons of the rule shews, that in its utmost latitude, it can be rationally and equitably applied to those cases only, where the unequal contributions of the parties, has been, either expressly, or impliedly *agreed* upon, or *assented* to by them. As if *by agreement*, A and B enter into partnership, upon terms, that A shall contribute $10,000, and B $5,000. There, nothing being said about the division of profits, an equal division shall be made, because the partners, by their silence, are *presumed* to have agreed to it, notwithstanding they have agreed to unequal contributions. The very reasons upon which the rule can alone be maintained, shew its inapplicability to cases, where the parties have not agreed or assented to unequal contributions; but where, on the contrary, they have stipulated for equal contributions, and where one of the parties has violated his agreement, by withholding a part of the capital he was to advance, and employing it for his private use or emolument. Such a defaulting partner, cannot, upon any legal or equitable principle, be placed on the same footing, with one, who, though he had not made an equal contribution, had contributed all, that by the contract of partnership, he was bound to contribute. If a partner, who is bound to equal contribution, may withhold one half, and yet claim an *equal* share of profit, he may withhold ninety-nine hundredth's, and yet claim half the profit; and thus, contrary to all reason, and the maxims of the law, not only profit by his own wrong, but profit the more, the more he wrongs.

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What then, is the case of Honore and Colmesnil? Is it the case of a partnership, where the parties have agreed upon an unequal contribution of capital? There is no proof, of any such *unequal* contract, and the court certainly cannot *infer* such a one. From the simple fact of *partnership*, the law can infer nothing but an agreement for equal advances of capital. Such must be understood, to be the agreement of the parties here. The court says, that "no gratuity" was intended, and the answer of Colmesnil, confirms the inference of law, that he was to contribute as much capital as Honore. But if nothing is to be gathered from the contradictousness of the bill and answer, the inference of law is conclusive.

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Colmesnil then, was under obligation to contribute as much as Honore contributed. If he has not done so, it seems to us, to be unjust and unreasonable, that he should profit, and his partner loose by his *breach* of obligation; that the partner, who is thus wronged, should be compensated for that wrong, and that the one who is in default, should suffer all the consequences of that default, seems to be too plain for argument. But how is this to be effected? Is it by compelling the defaulting partner, to pay interest upon the amount of his deficit, or by resorting to, and applying that appropriate and natural rule of equity, which divides the *profits* of the concern, in the same proportions, that the actual capital was contributed? We think that the latter, is the proper mode, and that the partner in default, can have no cause to complain of it. He has violated good faith and his contract, and a court of equity, will be careful, and will make sure, that he shall not gain by it, or his partner loose. There can be no hardship in the application of this rule to Mr. Colmesnil; but on the contrary, all the circumstances of the case, emphatically demand it, and mark him as a fit subject for its operation. He was the active partner *in the house*. He had the charge and keeping of the books of the concern. He made no entry, and kept no account of stock; his little hidden book, rejected by the court, can only be remembered as a trick and a fabrication, and shews the means by which he endeavored to beguile and deceive, and to *conceal*

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the deficiency of his own contribution. He had too, the means of making a full and equal contribution; but he withheld them from his company, in order to employ them, as he did, in his own private lucrative speculations. A court of equity, cannot therefore, feel any great tenderness to him or his interest. Partnerships are encouraged, because they promote the public interest, in the commerce of the country. They are emphatically founded upon *confidence*. The maxim of law is, that in all partnership transactions, "*fides exuberet*," and this is no otherwise to be observed, or enforced, than by applying the several sanctions, to every violation of it. We trust, therefore, without enlarging further on the subject, that your honors, "will perceive" sufficient grounds, upon which, not only "to resist the claim of Colmesnil, to one half the profits" of the partnership, but to give to Honore, a share proportioned to his greater advances; and that the opinion of this court will be altered and modified accordingly.

In addition to the modification, relative to the division of profit, between Honore and Colmesnil, we conceive the deductions, directed by the court, to be made from Honore's capital, should not be made. After the partnership was established upon the funds which were deposited at, or previous to the 12th April, 1817, any advances made by the firm, on account of either partner, should be charged to his individual account, and should constitute items to his debit, in an account current, as they would do, were he a stranger. The stock is a continual and permanent fund, the account current, varies each day, or may vary each hour. It is to be balanced by debits and credits, or is ultimately to be settled out of the profits of the concern, should a balance stand to the debit of either partner, upon the termination of the concern.

We would also remark, that there is no time fixed by the court, when the assumed settlement of the concern of the barge Mary, was entered on or concluded. The 1st of June, 1816, certainly is not that time. The note for $2252 was payable on that day, but the terms of the note prove incontestably, that it had been executed prior to that date, though Colmesnil has sworn

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it was made the day it was payable. Who ever gave a note due on the day of its date in such terms: "On or before the 1st day of June, 1816, &c." This proves beyond all doubt that the day of payment was future. This note was not given upon a settlement. Its terms preclude such an idea. It is for a specific consideration, for one half of the barge Mary.

The check carries no evidence of a settlement. It is dated 18th December, 1815, and does not balance the account, for Colmesnil is still compelled to charge money lent, to force that balance. But how can it be said, that there was a settlement at this date, when an account is charged as a continuation of a date anterior November, 1815. All this pretended settlement is in Colmesnil's own hand writing. The court seem to intimate, that there was a settlement between Honore and Colmesnil on the 12th April, 1817. It is respectfully suggested, that the record indicates no such fact. If there ever was a settlement, it was on the 14th November, 1815. The note for $2252, had been executed prior to that time. It should have then been surrendered; for at that date Colmesnil obtains a credit for his moiety of the barge, and he no longer had any claim upon the note. On the 10th November, he brings this into account, and first debits Honore with the price of the barge, which conclusively shews that the contract of purchase was prior to that date. All accounts subsequently predicated upon this note, are erroneous; all charges for interest are incorrect. If the accounts were settled on the 18th December, 1815, how could there be a balance of $283, on the 14th November antecedant, not included in that settlement. The pretended balance of $1491 36, is not correct; for how can Colmesnil pretend to charge interest up to 12th April, 1817, or to any later date, when he was debtor to Honore, even supposing these items of his accounts established, for the large sums he drew from Fishli, and upon which he paid no interest. Colmesnil's accounts are so barefacedly false, that all should be rejected. He puts a false date to his debits for the money drawn from Fishli, as will be seen by comparing Fishli's account with Colmesnil's. This could only be done as a pretext for charging Honore with interest. The court say, the allowance to Honore of rent

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for his store and warehouse, is correct. We would suggest, that the sum is too small, and hope it is not intended to conclude Honore on that point.

Petition for a modification.

If the court consider there ever was a settlement of the business of the barge Mary, we hope the time when, will be pointed out, and that all matters subsequent to that date, will be left open for adjustment by the commissioners.

The allowance to Colmesnil of $577 for pork, is not thought correct, because there is no proof that the pork cost that sum; and we hope, that the court will leave it to be proved.

With respect to the application of the funds of the firm to Colmesnil's private speculations in real estate, the Court, it is believed, have overlooked the proof. Tarascon's account and various others, Barbaroux, Cawthorns, &c., all shew the application of the property and money of the firm by Colmesnil to his individual use, without charging the same to his individual debit. We would trust, this would not be excluded from investigation.

The court does not intend to preclude Honore from proving before commissioners, any sums of money, or any profit realized by Colmesnil, by brokerage or exchange; yet as many things are mentioned particularly, and this is omitted in the catalogue of duties imposed upon the commissioners, it might be thought it was not open for investigation.

In relation to the commonwealth's paper received by Honore from Colmesnil, it is thought, that the fair construction of Honore's receipt, is that he received the paper to be accounted for by him at its value, and not at its nominal amount. If there have been collected any debts by Colmesnil in commonwealth's paper, such as he was authorised so to collect from the necessity of the case, then it would be proper for this sum to be applied in part, or in whole, to the extinction of Honore's proportion of the paper so collected. To the extent of such collection, he has a right to demand payment in kind, and equity would compel him to recover a moiety in kind. But should the sum paid Honore in paper, exceed his proportion, then it would seem that Col-

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mesnil should not be permitted to speculate upon a partner, whom he has forced out of business, and whose money he holds and deals out to him by pennies. Honore should only be charged the value of the paper at the time of receiving. We do not think Colmesnil should receive any compensation for his services, other than resulted from the advantages he derived from having all the capital and business of the firm of Honore and Colmesnil thrown into his hands, and the injury and injustice done Honore, by turning him out of his own warehouse and commission business. The appointment of Colmesnil agent of liquidation, relieved him from the opprobium and disgrace, which would otherwise have attached to his character and conduct, and proclaimed to the world that the court deemed him trustworthy and honest. But he has a compensation in appropriating three-fifths of the commissions himself, instead of an equal participation. Colmesnil knew well the importance of the office conferred on him, and sought it with eagerness and with the same pretence of superiority which he assumes in his answer, and upon which he founds his claims to exemption from rent. The court will see, that the continuation of the business, the use of the capital, and the credit derived to Colmesnil from his station, was adequate reward for all his services. We would respectfully solicit the court, to make such modifications of their opinion as have been suggested, and any other which will have a tendency to advance justice, and bring this prolix and complicated dispute to a close.

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The counsel for Colmesnil, filed the following petition for a re-hearing.

In regard to the suggestions made by Honore's counsel, I would remark, that it by no means appears, that his "contribution of capital, to the partnership stock, greatly exceeds that of Colmesnil."

Petition for a re-hearing

The amount of the proceeds of the cargo of the barge Dispatch, is not ascertained, the amount paid by Colmesnil and by the firm, on account of that cargo, is large, and it may well be doubted, whether Honore's stock, after it shall be ascertained in the manner directed by the opinion, will exceed $5000.

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The stock of Colmesnil will amount, at least, to that sum, when ascertained as directed by the opinion; indeed, the record exhibits proof to authorize the assertion, that Colmesnil did contribute at least $5000. But how are the profits to be divided? If the parties have stipulated on that subject, their stipulation must govern; if not, the profits should be equally divided, or the losses equally borne; the authorities cited in the brief and referred to by the court, fully maintain this position.

The bill distinctly states, that the profits were to be equally divided; the answer admits it, and the discrepancy between them, with respect to the capital, consists in this, that Honore alleges they were each to advance the whole of their monied capital, and Colmesnil contended that the capital was to be equal; both concurring in the statement that each was to participate equally in profits and losses.

The rule of law laid down in the opinion, seems not to be seriously contested, but an attempt is made to show that there are facts and circumstances in this case, which render that rule inapplicable.

These facts and circumstances do not exist, and the difference, in favor of Honore, in amount of capital, is altogether imaginary.

According to Honore's own statement of the terms, Colmesnil was to contribute "all his monied capital;" he did contribute largely, and there is no proof, or circumstance from which it can be inferred, that he did not put in the whole of his monied capital.

The amended bills of Honore, and sworn to by him, would show that Colmesnil's means, when the co-partnership was formed, were very limited, and he has labored most excessively to sustain that allegation by proof.

No other than an equal distribution of the profits can be directed, if regard is to be paid, either to the agreement of the parties, or to the well settled principles of law, if such agreement did not exist.

It is also suggested by the counsel of Honore, that all advances made by either partner, after the 12th of

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April, 1817, (the commencement of the co-partnership,) should not be considered as stock, but should be placed to his credit in an account current.

Petition for a re-hearing.

This would be so obviously unjust, that I scarcely conceive it necessary to respond. It is not presumable that the whole capital could be immediately employed; if, therefore, the co-partners made advances as the business of the firm required them, and in a reasonable time after the co-partnership was formed, the purposes of the firm were as well answered as if the money had been paid at its commencement. It must have been upon the supposition that the advances made by Colmesnil, subsequent to the 12th April, 1817, constituted no part of his stock, that the counsel for Honore have assumed the fact of the great difference in favor of Honore, in capital advanced.

It is suggested that the court has not designated the period when the settlement between the parties took place, in respect to the concern of the barge Mary. The period alluded to by the court, was doubtless, when the balance of $283 49, was found due to Colmesnil. I would respectfully suggest, that the proper period to be fixed by the court, would be the winter of 1819–20, at which period, the accounts were re-examined and settled by Tyler and Stewart, at the request of the parties.

I do not believe it can be necessary for me to respond to the charges, that the accounts of my client are "barefacedly false," that "he put false dates to his debits," &c. It will be sufficient to say that there is not a syllable of proof to support the charge, and it must have been based upon the bare assumption of an adversary, whose conduct in this business deserves any thing, rather than commendation.

The allowance made to Honore, for store and warehouse rent, is exorbitant, according to the proof in the cause; yet as the object of my client is to terminate this controversy, I hope the court will consider that point as at rest.

The allowance to Colmesnil of $577, for pork, is so obviously correct, that I will not add any thing on that point, to the suggestions already made to the court in the brief.

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By the opinion of the court, the claim of Honore, for pretended applications of company funds to private purposes, by Colmesnil, is put to rest; it is suggested by Honore's counsel, that the claim should be left open. I trust not. I would invite the court to the strictest scrutiny of the testimony on this point, and if my client is at all culpable, hold him to the most rigid account; if, on the contrary, the claim is groundless, false and fabricated, as I believe it to be, let it remain as it is, rejected.

The counsel for Honore are mistaken when they say, "the court does not intend to preclude Honore from proving, before commissioners, any sums of money, or any profit realized by Colmesnil, by brokerage or exchange." If the intention of the court is to be ascertained by what they have said, or by what would be right, had they said nothing on the subject, then this point, as the last one noticed, has been properly put to rest.

The parties were fully prepared on these points, and no reason is assigned and now appears, why they should be left open for further proof. It is desirable that there should be an end of the controversy, and that the duties of the circuit court and its commissioner, after the return of the cause, should be simplified as much as possible, and not that the whole subject should be left at large.

With respect to the $2000 of Commonwealth paper, received by Honore, I would say, that the disposition directed by the opinion, comports with equity and justice, and is far preferable to the mode pointed out by the counsel of Honore. Should the facts turn out as the counsel suppose, Honore will not be prejudiced, because the circuit court will direct that he shall receive his proportion of Commonwealth's paper, in kind, and he will have the benefit of its appreciation.

The only remaining point to be noticed, is the objection to an allowance to Colmesnil, for his services, as agent, in winding up the concern. The reasons given in the opinion, for this allowance, are so satisfactory, that it is needless to say more.

The reasons urged against it, are based upon mistake; Honore was not "turned out of his own ware-

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Petition for a re-hearing.

house and commission business," Colmesnil commenced business in another house, and Honore continued business in the house which had been occupied by the firm. No profit resulted to Colmesnil from the use of the company funds; so soon as the funds accumulated, Honore received his proportion; on the contrary, the court must perceive that Colmesnil will sustain a heavy loss in consequence of this agency. For it is settled by the opinion, that his receipts of depreciated paper, must be accounted for by him, as specie.

In addition, it may be remarked, that the responsibility imposed on him, was immense; for want of diligence, by mistake, or from other causes, he might and probably has, rendered himself liable to make good, losses which have occurred, and it would be a violation of every principle of justice, equity or morality, to say that he should not be compensated.

Having briefly noticed the suggestions for a modification of the opinion, I would now most respectfully ask the court to reconsider so much of the opinion as settles the cargo of the barge Despatch, to be the sole property of Honore.

If I did not firmly believe that the cargo of that barge was joint property, and that the facts and circumstances of the case clearly demonstrate it so to be, I would forbear to trouble the court in a re-examination of the question. But, believing as I do, that it was the property of the firm, a sense of duty constrains me to present, in a hasty and brief manner, the proofs in support of that opinion.

I do not pretend to controvert that the cargo was purchased in New-Orleans, by Honore, and upon his own account; it was procured from G. Musson, and from others, upon his credit.

The second amended bill filed by Honore, on oath, states that he had been concerned with Colmesnil for two years, prior to the commencement of the copartnership, in running the barges Mary and Despatch; this statement does not consist with his claim to be sole owner of both barge and cargo.

The court misapprehended the counsel of Colmesnil, when they supposed that "his claim to be joint

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owner of the cargo of the barge Despatch," was rested "upon an agreement between the parties, that the partnership, when formed, should relate back to the commencement of the voyage of the barge." His claim to be joint owner, was pressed on other grounds, and the circumstance that if the barge and cargo had been lost on the return voyage, that the loss would have fallen on Honore alone, does not, at all militate against his claim to be joint owner. If Honore was originally to be owner, and after the arrival of the barge at Shippingport, he had sold the cargo or any part of it, with equal propriety might it be said, that the purchaser acquired no title, because, if the boat had been lost before the sale, such loss would have fallen on Honore.

It was contended by Colmesnil's counsel, and is now confidently re-asserted, that the proof of his joint ownership of that cargo, was entirely satisfactory, if not conclusive.

Upon what principle of honesty or fair dealing, can the fact of Honore's accepting the draft of Musson, for $1447, after the commencement of the partnership, drawn in part payment of the cargo of the barge, and accepting it, as he did, in the name of the firm, be reconciled with his claim, to be the exclusive owner?

If the cargo was his sole property, what right had he to accept a draft, drawn upon himself only, in the name of the firm, and to pay that draft with company funds, without even charging himself to the company, with the account? Yet this was done, and it is proof of a strong character, to show that the cargo was company property, and had become so by agreement of the parties, upon the formation of the co-partnership.

Another fact of a conclusive character was relied on; Musson transferred the balance due him, by Honore, for the cost of the cargo, to the debit of the firm, at a time when Honore was in New Orleans; and the presumption is strong, therefore, that it was done by Honore's directions. Musson had left the United States, it was impossible to take his deposition, to prove Honore's directions; and the deposition of a clerk in the house, was taken to prove that the transfer was made without any directions; the deposition does not disprove the fact of Honore's directing the transfer;

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but when it is considered, that the account current of Musson, was rendered years before the dissolution of the co-partnership; that the account shewed the transfer, and that Honore, all that time, did not correct the mistake, if it was one; did not object and offer to have the mistake corrected; did not, as he should have done, charge himself to the firm, with the amount of the firm's assumpsit, to Musson, it would seem impossible, longer to doubt, as to whom the cargo belonged.

Another fact was relied on, which is entitled to great weight; a short time previous to the dissolution of the co-partnership, Honore, when called on by the arbitrators, to state the amount of capital paid in by him, declared that it amounted only to from 6 to $8000. If this statement was true, it was impossible that he was the sole owner of the cargo of the barge, which cost more than $8000 originally.

If Colmesnil was not joint owner of the cargo, why was he not credited, by Honore, in private account, with the $1120 63, which he paid on the draft of M. White & Co. in favor of M'Connell, which draft was drawn in part payment of the cargo?

If Honore was sole owner, why did he not open an account of sales of the cargo, upon the books of the firm? He was familiar, at that period, with the books, frequently examined and scrutinized them, and knew that no such account had been opened, and, therefore, that it would be impossible, ever to ascertain the proceeds of the sales. It cannot be pretended, that he would have permitted the sales to have been made in this way, and the proceeds to be devoted to company uses, without any account being kept, or his receiving any credit therefor.

If Honore was sole owner, it is a fact that he always was apprised of, yet, we find, that in his original bill, he set up no such claim; nor in his first, or second amended bills, though his second amended bill, was filed on the 23d May, 1820, three days after the auditor's report was returned, and near three months after the answer to the original bill had been filed, accompanied by Colmesnil's exhibit of the stock account, made up exclusively of items growing out of the pur-

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chase, disbursements and cargo of the barge Despatch; and his third amended bill, in which this claim is just introduced, was not filed until 18 months after the institution of the suit.

Petition for a re-hearing.

But can it be possible that this claim is just? When the auditors first met, they required the parties to submit their claims in writing; Honore submitted his, and amongst them, is no claim to the exclusive ownership of this barge and cargo. On the contrary, he claims $700, being half the cost of the barge, and this claim is under date of September, 1816; he claims $739 11, being half the amount of bill, for 35 crates of ware, (part of the cargo) under date 8th November, 1816; he claims also $2000, being half of $4000 paid Musson, through Fishli, on account of the cargo. What was the answer to these claims? To the first, that he had been credited in stock account, with $1400, the whole price of the barge; to the second, that he had been credited by $1478 22, the whole cost of the crates of ware, and to the third, that he had been credited with the $4000.

Had he been ignorant before, of Colmesnil's just claim to one moiety of the cargo, could he have remained so a moment after? It would seem impossible. Yet, in his second amended bill, filed subsequently, we find no claim set up by him. It seems to be impossible to reconcile these facts, with the idea, that Honore was the exclusive owner of the cargo, of the barge Despatch. A variety of other circumstances might be referred to, entirely inconsistent with Honore's claim; it is hoped, however, that those already pointed out, will be found sufficient to authorize the court to grant a re-hearing on this point.

The response of the court, delivered by Judge Underwood, July 3d, 1829.

Response of the court, by judge Underwood.

We have considered the suggestions made by the counsel for both parties, and only deem it proper to make a few remarks, by way of explanation, for the purpose of rendering the original opinion the more certain, and less liable to misinterpretation. The claim asserted by Honore, for interest, on the excess of his stock, brought forward for in the petition of his counsel, is not allowed. It is uncertain what the

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amount of such excess will be, if any thing; although it is probable, that there is a considerable excess in his favour, there is no time fixed, from which the calculation of interest should commence. If Colmesnil did not contribute his proper portion of capital, at the time when, by the contract of co-partnership, he should have furnished it, Honore might have called on him to explain the cause of his default; and if forbearance and indulgence, was therefore granted, a stipulation for interest or an equivalent, might have been made. No such thing appears to have been done. No complaint, pending the existence of the firm was made on the subject. It does not appear, that any amount of capital was ever agreed on. Nor was any stipulation made, in regard to the failure of either partner, to furnish his proportion. Nor does it appear that Honore might not have withdrawn any excess of capital, furnished by him at any time. We cannot ascertain the period at which the whole capital of each partner, was to be invested. There is a cloud of uncertainty, hanging over the transactions of the parties, which conceals from our view, the true nature of the contract, actually made by them; and therefore, we have not the data, upon which to direct the allowance of interest on Honore's capital, or any part of it in a manner satisfactory, if we were disposed to do it. There may be cases, where the terms of the partnership, are so well ascertained, that a defaulting partner, might with certainty and propriety be charged with interest, or be compelled to pay his co-partner damages, for a failure to comply, with his partnership engagement. But this is not a case of that kind, and we shall withhold an application of the doctrines contended for, until a proper case is presented.

Response of the court, by judge Underwood.

It was intended by the court, to preclude all investigation, upon the return of the cause, as to profits made by Colmesnil, in the exchange and brockerage business. It does not appear, that he and Honore were ever partners in a business of that sort. So far as Colmesnil has admitted, that he applied the funds of the firm, to making profit in that way, for the use and benefit of the firm, it would not be improper to regard it as sanctioned by Honore, so as to give him a share of the profits. Colmesnil states, that his profit was

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Response of the court, by judge Underwood,

accounted for, and paid over to the firm. There is no proof that he withheld any, nor is there any proof, how much money of the firm he used in that business. If it can be shown, that Colmesnil withdrew funds of the firm, for the purpose of dealing in exchange, or for any other purpose, and has not accounted for the funds so withdrawn, by charging himself with their amount, or in some other way, it would be proper yet, to charge him with the funds so withdrawn, and in relation to such a withdrawal of funds, the commissioners may hear, and ought to hear evidence, should any be offered. The original opinion did not intend to shut the door against such evidence, but it was intended to close it against an investigation, as to the profits made by the exchange and brockerage business, because it seemed to us, that it was foreign to the purposes of the partnership, and would result in an useless consumption of time; nothing appeared on the subject, so far as the cause has progressed, which would enable us to decide any thing in regard to it, and as nothing had been made to appear, we were not disposed to multiply points for future attention, upon a possibility that something might be shown, that would operate beneficially to Honore. Neither ought Colmesnil to be permitted to reclaim any profits for exchange or brockerage, paid over to the firm. We can readily see that there may be a propriety in connecting the drayage business with a commission warehouse, and in this case, the accounts for drayage ought to be considered. Profits on exchange are very different, and so far as they have not already been accounted for, by Colmesnil, we shall not hold him to an account. If he had purchased a lottery ticket with the funds of the firm, in his name, and drawn a large prize, he would be accountable for the money thus appropriated, but not for the avails of the ticket. If Colmesnil has, by withdrawing and diminishing the stock of the firm, and applying it to his own use, thereby diminished the profit of the firm, in its business and course of trade; it is an injury to his partner, for which he ought to account, and if it shall appear that he has withdrawn from the firm, more than he was entitled to, so as to diminish the capital stock, it would be proper to compensate Honore, for an injury thus imposed.

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The date of the check, given by Honore to Colmesnil, to-wit: December 18, 1815, is the time, beyond which, the parties should not be permitted to go, in bringing foward accounts against each other. It is at that date, we presume, a settlement was made between the parties, and which ought not now to be molested. The commissioners allowed a balance, which appeared on Honore's book, in favor of Colmesnil, subsequent to that date, and which was brought into, and made a part of the sum of $1,491 35, allowed by them to Colmesnil. We have sanctioned that balance, for reasons, satisfactory to us, and which would be useless to detail.

Response of the court, by judge Underwood.

We have not deemed it necessary, to notice any other suggestion, as we shall permit the original opinion, to remain with this explanation.

Pritchard vs. Ford.

ASSUMPSIT.

Error to the Bourbon Circuit; GEORGE SHANNON, Judge.

Case 142.

Indebitatus Assumpsit.

Judge ROBERTSON delivered the opinion of the Court.

June 16.

FORD delivered to Pritchard two horses, and $130 or $135, to pay to Keiser for a mill, which Pritchard had bought from Keiser. Pritchard paid the horses and money to Keiser accordingly. It is proved that Ford said afterwards, that he was a partner with Pritchard, in the mill. It seems that Ford and Pritchard "fell out," and Ford is not known to have had any legal interest in the mill, or ever to have received any profit from it. After the rupture between him and Pritchard, Ford brought an indebitatus assumpsit against Pritchard, for money had and received, and recovered a verdict and judgment for the value of the horses and for the money, which had been appropriated by Pritchard towards paying for the mill. The foregoing facts were proved on the trial; and it was also proved, that Pritchard told witness that he would pay Ford, if he would have property valued.

Indebitatus assumpsit, for money had & received, to pl'tffs. use, can not be maintained, where the defˈt. has received part property and part money.

If the defˈt. have sold the property of the plˈtff. for money, the action can be maintained for the price.

Pritchard seeks to reverse this judgment, on two grounds, to-wit: 1. That indebitatus assumpsit for

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PRITCHARD vs. FORD.

money had and received, could not be maintained for the horses. 2. That no action at law was maintainable, as the parties were proved to have been partners.

Indebitatus assumpsit can be brought only for money. And the delivery or sale of property, will not sustain indebitatus assumpsit, for *money had and received.* But if the property of one person has been converted into money by another, a promise to pay the money to the owner of the property may be implied. The money is received to his use; Lord Raymond, 1007; Douglas, 137; 2 Comyn on Contracts, 19–20. The reason why assumpsit for money had and received, will not lie for property, is, that in such a case, the defendant is not notified by the declaration, of the specific character of the demand. But when the property of one person has been sold for money by another, as the law implies that the money was received to the use of the owner of the property, a declaration in assumpsit for money had and received to the plaintiff's use, is sufficient notice to the defendant, and will correspond with the proof. But assumpsit for money had and received, can not be maintained, unless the consideration be money. If one pay to another money through mistake, or on a consideration which shall have failed, the law supposes the payment to be made to the use of him who makes the advance and "*ex equo et bono,*" implies a promise to restore the amount.

So if one man convert into money, a chattel of another, he is a trustee of the money for the owner of the chattel, and by construction of law, the money is received to his use. Hence, in any case in either of these classes, indebitatus assumpsit for money had and received, may be sustained.

But if the chattel be sold by its owner, a subsequent sale of it by his purchaser, will not authorize the first seller to sue for the price in a count for money had and received to his use; because, the money is not received in fact or by intendment of law to his use. The sole consideration for the liability of the purchaser from him, is the purchase of the chattel. The seller therefore, must state the consideration in his declaration, to be property and not money. A plaintiff must declare according to the facts of his case, or according

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to their legal effect. He would do neither in the case last stated, if he should declare for money received to his use by the defendant.

In this case, if the horses were delivered by Ford to Pritchard, for the purpose of being paid to Keiser, either for the benefit of Pritchard or himself, he could not sue for money received by Pritchard to his use. Pritchard received from him no money. If the horses were paid over to Keiser, for Pritchard alone, without any express contract for payment of the price to Ford, the law would imply a contract for their value; and then Ford must declare on a "*quantum valebat*," for the property delivered, and not for money had and received. If Ford were a partner with Pritchard in the mill, and the horses were paid on his own account, surely he can not recover their value from Pritchard, in an action for *money* received by Pritchard to his use. But although he may have been concerned in interest as a partner, he might recover in the appropriate action at law, for the horses and the money. For the nature and extent of the partnership do not appear. It is not known that Ford had any interest in the title to the mill; and for aught that appears, his interest may have been in the profits alone. Hence the payment of the money and horses for the mill, might not have been embraced in the partnership concern. Besides, it seems that the contract of partnership, was not carried into effect. The general reason, therefore, why a suit at law can not be maintained by one partner against another, for a partnership concern, does not apply to this case.

And if it had been proved, that Ford and Pritchard were partners in the purchase of the mill, as there is no evidence that Pritchard had paid any part of the price, the jury were at liberty to infer, that the only payment which had been made, was that made with the money and horses of Ford. And on this hypothesis Ford might be allowed to recover in a suit at law. A partner who pays solely a demand on the firm, may maintain assumpsit for it, especially after dissolution; Gow, 113.

Therefore, in assumpsit for the value of the horses, Ford might be entitled to a judgment against Pritch-

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PRITCHARD vs. FORD.

ard. He had a right to a judgment for the money paid, in the suit for money had and received. But he had no right in this suit to a judgment for the value of the horses. There is no count that will embrace the evidence as to them. Therefore, the judgment to this extent and for this reason, is erroneous. There is not only no evidence that Pritchard received money for the horses, but it is certain that he did not; and if he had sold them for money, Ford could not recover the amount in assumpsit for money had and received, because he had either sold them to Pritchard, and therefore must sue on his contract express or implied, or he had paid them on his own account, and therefore could recover for them, only in a special assumpsit, on appropriate allegations corresponding with the proof.

The objection that there was no issue on the plea of set off, could not avail Pritchard. It was his fault, that there was no issue on this plea. He failed to rejoin to the replication of the statute of limitations. Therefore, he has no right to object that no issue was concluded on this plea. For it is an established doctrine, that the party who occasions a deficit of pleading, can not take advantage of his own wrong or omission, if there be (as in this case,) any issue on which to establish the verdict, and that verdict be against him.

But as, according to the evidence, the jury had no right to find for Ford more than the amount advanced by him in money towards paying for the mill, the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial; in which, as there seems to have been some mistake in the pleadings, the court may permit the parties to amend them, if they shall desire to do so; in which event, the declaration and the other pleadings may be so shaped as to embrace the whole controversy between the parties.

Ford must pay the costs in this court.

Crittenden, for plaintiff; *Triplett*, for defendant.

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Heath et als. vs. Mitcherson.

CHANCERY

Error to the Caldwell Circuit; B. SHACKLEFORD, Judge. Case 143

Practice in Chancery. Bill pro confesso. Decree.

Judge ROBERTSON delivered the opinion of the Court. June 16.

WE approve the decree in this case on the merits. And although there are some irregularities in the proceedings, and in the decree itself, they are not sufficient, in our opinion, for a reversal. If defendant served with subpœna, decree against him, not erroneous, tho' the bill has not been taken for confessed.

The subpœna *was* executed on Reynolds. He did not answer. The court had a right therefore, to decree as to him; and it was not necessary that it should appear *formally* on the record, that the bill was taken for confessed against him. Party not injured by a decree, cannot complain for irregularity.

It would have been more regular, not to have decreed that Reynolds and Heath pay to Mitcherson; but to have decreed that Heath should pay, in part satisfaction of Mitcherson's judgment against Reynolds, what he owed Reynolds; and that the judgment against Reynolds should be credited for that amount. But the parties cannot be prejudiced by the form of the decree. Heath cannot object that there is a decree against Reynolds as well as himself; and Reynolds ought not to object, because the decree imposes on him no stronger obligation than a judgment on the first judgment at law would, or than this first judgment itself did. And if he or Heath, pay the amount decreed, that will entitle him to a credit "*pro tanto*" on the judgment. He is in no danger therefore, of being injured by the decree.

Wherefore, the decree is affirmed, with costs and damages.

Denny, for plaintiff.

Calvert vs. Simpson.

ASSUMPSIT.

Error to the Caldwell Circuit; B SHACKELFORD, Judge. Case 144.

Assumpsit. Use and Occupation. Statute. Frauds. Contracts, express, implied.

Judge ROBERTSON delivered the opinion of the Court. June 16.

THIS was an action of assumpsit, for use and occupation of a house and lot, for three years. Assumpsit for use and oc-

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CALVERT vs. SIMPSON.

On the trial, it being found that Simpson leased the house, by parol contract, for three years, at $50 a year; the court, on his motion, instructed the jury to find, as in case of a non-suit, and the verdict and judgment were accordingly for the defendant.

cupation, the proper action where no legal, special contract. Statute of Frauds, does not render a parol lease, for more than one year, void; but precludes recovery upon such contract Though such parol lease cannot be enforced; yet, when executed by the actual occupation of the premises, the law will enforce payment for the use and occupation, but not more than was agreed upon, nor sooner.

The instruction of the court is palpably wrong. It must have been based on the opinion, either that assumpsit would not lie for use and occupation, or that the statute of frauds and perjuries applied to the case. We suppose that the latter reason, was that which influenced the court. For the first declaration was on the special contract, and the court sustained a demurrer to it; and then an amended declaration, for use and occupation, was filed, which would not have been done, if it had been the opinion of the court, that debt on the contract, implied by the privity of estate, was the appropriate remedy. Although it was long doubted, whether assumpsit could be maintained for use and occupation; we consider it now well settled by authority, fortified by principle and analogy, that it is the most appropriate action. It must, therefore, have been the opinion of the court, that there could be no recovery for use and occupation of the house and lot, because they were occupied under an express parol contract, for a longer term than one year.

This is evidently a mistake. The statute of frauds prevents the *enforcement* of such a contract, *by suit*. It declares that no action shall be brought upon it. But it does not declare it void. It is not void. If executed, it is good. If executed by the lessor, the lessee may object to a suit upon it; but he will not be permitted to treat it as a nullity. He may protect himself from the charge of trespass, by proving it. He may prevent a recovery by the lessor, for more than the amount of rent, which it stipulated for. And the only effect of the statute, in such a case, on the rights of the lessor is, *that it deprives him of any benefit from the express contract. He* cannot enforce it. He cannot sue upon it. But as the lessee has occupied his house or his land, the law will imply, that he has undertaken to pay the value of the use. There is no reason why the law would not imply a contract, to pay for the use of land, as readily as for the use of any thing else. If

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there be no special contract for the use, the implication will certainly arise. If there be a legal, express contract, none could be implied, because the law will imply a contract, only when there is no express contract, which it can recognize. If one man occupy the land of another, for one year, without any express contract for rent, he will be bound by conscience and law, to pay the owner the value of the use. Ought he not to be equally bound, if he shall occupy it two years? It being proved, that there was an express contract for the rent, for two years, cannot entitle the defendant to a non-suit, on the ground that the contract proved, and that alleged, are different. Because no suit can be maintained, except upon the implied contract. And surely, in such a case, the plaintiff has as much right to recover the value of the use of his land, as he would have, if there had been no contract for the price, except that he ought not to recover more than he had agreed to take, nor sooner than he could, by the terms of the express contract, if he were allowed to sue on it.

This seems to be the suggestion of reason, and the dictate of sound morality. It is certainly the doctrine of the law. Many analogies might be cited, for illustration. But it is not *now* necessary to appeal to any such arguments. The case of Roberts vs. Tonnell, 3 Monroe, 247, is a direct authority.

Wherefore, the judgment of the circuit court is reversed, the verdict set aside, and the cause remanded, for a new trial.

Denny, for plaintiff.

Gayle vs. Overton.

FORCIBLE ENTRY.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 145.

Forcible entry. Warrant. Inquisition. Traverse. Judgment. Restitution.

Judge ROBERTSON delivered the opinion of the Court.

June 16.

OVERTON issued a warrant against Gayle, for a "*forcible entry.*" The jury found Gayle guilty of "the forcible *detainer* complained of in the warrant."

Warrant charges forcible "entry." Inquisition

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BELL vs. COM'TH. &c.

finds forcible "detainer." Error to reneer judgment for restitution

On a traverse of the inquisition, in the circuit court, a jury returned the following verdict: "we of the jury, find the inquisition true." The court having rendered judgment of restitution, the traverser has prosecuted his writ of error, to reverse the judgment.

A traverse waives all objections to form, in the warrant. But the warrant is the basis of the judgment of restitution. There can be no valid judgment, for any thing not charged in the warrant. The inquest in this case, does not correspond with the warrant. It finds the defendant in the warrant, guilty of that with which the plaintiff had not charged him. It is, therefore, not responsive to the issue, which the jury was sworn to try, and must be considered a nullity. The justice was not authorized to render a judgment of restitution upon it; consequently, the circuit court could not do it. There has been no decision of this court, directly on this point. But it seems to us to be self evident, on principle, that a court cannot give judgment for that which is not demanded. Whether the inquisition be literally true or false, is immaterial, if it finds a fact not in issue. There must be a warrant; it must specify the cause of complaint; consequently no other cause can be inquired into.

As, therefore, the warrant charged "*a forcible entry*," and the jury found a "*forcible detainer*," the inquisition ought to have been quashed, and the court erred in entering judgment for restitution.

Wherefore, the judgment is reversed and the cause remanded.

Depew, for plaintiff; *Triplett*, for defendant.

DEBT.

Bell vs. Commonwealth, use of Clarke,

Case 146.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Sheriff. Execution. Levy. Duty. Responsibility. Official bond. Conditions. Evidence.

June 16.

Judge UNDERWOOD delivered the opinion of the Court.

THIS case involves the following points.

1st. What should be averred in a declaration, to charge

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a sheriff, on his official bond, for failing to secure, by replevin bond, or to make the money on an execution, put into his hands for collection? And, 2d. Whether certain instructions asked for by the plaintiff here and defendant below, and refused by the court, ought not to have been given?

Duty of sheriff to make sufficient levy before the return day of *fi: fa:* if the deft. have property in the county, subject to execution, and within the knowledge of the sheriff.

One condition of the sheriff's bond is, that he shall "well and truly *execute* and due *return* make, of all process and precepts to him directed, and to him or his deputies delivered." In compliance with this stipulation of the bond, it is doubtless the sheriff's duty, in virtue of the execution put into his hands, to levy upon the property of the defendant, taking a sufficiency to bring the amount of the debt, if to be had, and to do it before the return day of the execution, if not prevented by a good excuse, such as want of time, owing to the late period at which the execution came to hand, disease, &c.

It is not necessary, in this case, to say any thing relative to the duties of the officer, in *returning* process, as the action is founded exclusively on the failure to *execute*. And for the same reason, it is unnecessary to speak of the proper conduct to be observed in disposing of property after the levy. To enable a sheriff well and truly to *execute* a *fieri facias*, two things are essential. 1st. That the defendant should have property subject to execution. And, 2d. That such property should be found in the county. If the defendant has no property in the county, to which the *fi. fa.* is directed, subject to execution, the sheriff has nothing to do but to make *due return* of the process. But if there be property in the county, liable under the law, and on which a levy could legally be made, then it becomes an important matter to prescribe, with certainty and precision, the rules which shall ascertain and limit the responsibility of the officer, in case he fails to levy upon it.

To render sheriff liable for failure to *levy*, it must appear that he had knowledge of pro-

What degree of diligence in the first place, must the sheriff use, to ascertain whether the defendant has property in his county? Suppose all the parties to the judgment and execution live in Hickman, where the judgment is obtained, and the execution is directed and delivered to the sheriff of Greenup, in which county

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BELL vs. COM'TH.

perty, subject to the execution, or of facts which would have enabled him to ascertain such property

the defendant may have a tract of land unknown to the sheriff, or personal property secreted, is the sheriff of Greenup bound, at his peril, to find the property and levy upon it; and if he fails, shall he be made pay the debt or any part of it, for his failure? We think not. How shall he begin his inquiry? Those who may have possession of personal property, held secretly for the defendant, are ostensible owners. The law presumes they are *bona fide* owners, until the contrary appears. Shall the sheriff go to every man in his county, and enquire for property owned by the defendant, or shall he point out particular articles of property, and enquire whether they belong to the defendant? Or how many must he inquire of? In such a case, it would be absurd and often impossible to make the inquiry of a tenth part of the population of a county, before the execution should be returned to the office whence it issued. The difficulties in regard to finding land would be equally great, and therefore, in the case supposed, we could not hold the sheriff liable for failing to execute, unless it were clearly shown that *he knew of the property, could have levied on it, and did not.* In cases of this kind, it is usual for the plaintiff to show property, but it is not the showing of the property by the plaintiff that creates the liability of the officer, as we conceive. If it were pointed out by another instead of the plaintiff, it would do as well. If the sheriff had knowledge, no matter how he obtained it, but it should be such knowledge, as would produce reasonable certainty, that the property belonged to the defendant in the execution. We would not require him to pay attention to every idle suggestion or surmise.

Difference between the evidence of knowledge, as to personal property and land.

If the parties to the judgment and execution all lived in the same county, and the execution was directed and delivered to the sheriff of that county, and the defendant in the execution was notoriously wealthy, and possessed of a large estate, it would seem to be entirely useless, that any one should inform the sheriff what property belonged to such defendant. But why would it be useless? There are two reasons for it; in the first place, a violent presumption would arise in such a case, that the sheriff did know that the defendant had property within the county; and in the second place, that reasonable diligence would enable him to

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identify the defendant's property, regarding the fact of open possession as *prima facie* evidence of ownership. But in this case, as well as in the other, the liability of the sheriff would equally depend upon his knowledge of the existence of property subject to the execution, on which he could have levied, and did not.

Between these extremes, there are cases of endless variety, which may be imagined, but in the whole of them we conceive that the sheriff's liability must depend upon the establishment of the fact, by positive or circumstantial evidence, that he had knowledge of property owned by the defendant, subject to the execution, and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find property. With such knowledge and the ability to levy on the property, by reasonable diligence and exertion, being without excuse, from want of time, &c. if he failed to levy, or in the language of his bond, to *execute*, he would clearly be answerable for all damages the plaintiff might sustain by reason of his failure. If the whole debt should be lost by it, he should pay the whole. If the entire debt was not lost, but could still be collected in whole or part, he should pay damages commensurate to the injury resulting from his failure. Thus, making the liability of the officer depend upon his knowledge, it may be said that, as he cannot positively know who is the real owner of the hundreth or thousandth part of the property in his county, his liability is only nominal, and will be of no practical utility.

We do not mean that his knowledge must be shown to amount to absolute certainty. Far from it. We conceive that there is a plain rule of law applicable to the subject, which will fix his liability so as to secure a proper degree of responsibility, and to exempt him, at the same time, from oppressive rigor. As possession of personal property is *prima facie* evidence of ownership, wherever it is shown that the sheriff knew the defendant in the execution was possessed of personal property, we would require him to regard the property so possessed, as owned by the defendant; and if he fails to levy on it, we would throw the burden of proof upon him, and require that he should show that the

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property was not subject to the execution. Land, by statute, is only subject to execution, *sub modo*, the presumption of ownership from possession, does not operate, and, therefore, we would require, in respect to land, positive proof of the sheriff's knowledge of title, or that it should be shown and designated by the plaintiff, his attorney or agent. No hardship can accrue to a sheriff, under this doctrine, for he can protect himself against an action of trespass, by empannelling a jury to try the right of property.

Sheriff liable, unless he make reasonable search after the property of def't.

The foregoing observations present our views of the proper foundation for responsibility, on the part of the sheriff. But there is a class of cases coming within the operation of the principle, and which may seem not to be embraced by it, at first view. They are cases in which, from the knowledge of certain facts, the sheriff ought to make exertions to ascertain and find the property on which to levy, if there be property in his county, subject to the execution. For example; if the sheriff knows the defendant, and where he resides, it is his duty to go to his house in pursuit of the property. If he knows the defendant, but does not know where he resides, yet, if he could ascertain the place of residence, by reasonable inquiry, and did not, he ought to be held responsible, provided it can be shown that property to satisfy the execution, or part thereof, could be had by going to the defendant's residence. In these and similar cases, the officer having a knowledge of such facts as would create a presumption, that by proper diligence he might secure the debt, he should be answerable for failing to exert himself. He must not expect defendants to bring their property to him; he must hunt up their property, and is answerable if he does not, when his knowledge of facts is sufficient to put him on the look out.

The whole of the foregoing considerations may be summed up in this rule, that sheriffs are required to use proper diligence in the execution of the duties of their offices; and if by proper diligence they could secure a plaintiff's debt, and should fail to do it, they are responsible. The reasoning which we have entered into, was designed to ascertain and limit the nature of the diligence to be used, and the principles upon which it is required.

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From the view of the subject which we have taken, it results that a declaration against a sheriff, for breach of his official bond, in failing to execute a *fi. fa.* should aver that the defendant in the execution had property liable to the execution, situated in the county, out of which the debt or part thereof, might have been made, and that the sheriff or his deputy, into whose hands the execution may have been placed, could, while the execution was in his hands, and in full force, by the use of proper diligence on his part, have levied thereon. If the sheriff has any good excuse for failing to make the levy, it is his duty to set it forth by plea. Testing the declaration in the present case, by the principles here laid down, although it is, in form, not strictly correct, yet in substance we think it good. The different counts aver that the defendant neglected and failed to do his duty, whereby the debt was lost. This averment is made after seting out that Gower, the defendant in the execution, lived in the county, and had property sufficient to pay the debt. The sheriff could not have neglected and failed in his duty, unless by proper diligence, while the execution was in force and in his hands, he could have secured the debt, or part thereof. We will not, therefore, after verdict, set aside a judgment, to correct mere matters of form. It follows from this, that the court did not err in refusing to instruct the jury to disregard the first and third counts.

The averments requisite in declaration, to charge sheriff on his official bond, for failing to levy execution.

Since the statute of 1821, 1 Dig. 504, sheriff bound to levy upon interest of mortgagor, and responsible for failure.

The defendant read in evidence, a mortgage executed by Gower, and moved the court to instruct the jury that he was not bound to levy the execution on the mortgaged property. The court refused the instruction and we think, properly. The mortgage bore date 3d May, 1823, after the passage of the act subjecting the interest of mortgagors to sale under execution, and the sheriff was as much bound to sell that interest, as he was the absolute and fee simple title.

Incomplete replevy bond, in hand writing of deputy sheriff, admitted as evidence, in action vs. principal, to prove that execution was in the hands of deputy, and when.

We perceive no error in admitting the replevin bond prepared in the hand writing of Freeman, a deputy of the defendant, to be read in evidence. It was a circumstance from which a legitimate inference might be drawn, that the execution had been placed in Freeman's hand; and the time he had it, might also be ascertained, by the incomplete replevin bond. The replevin

STAGNER vs. FOX.

bond was obviously not completed, so that the judgment merged in it, and was no satisfaction of the execution. It was not signed by any surety of Gower, and not attested by the officer.

Judgment affirmed with costs.

Monroe, for plaintiff; *Caperton*, for defendant.

CHANCERY.

Stagner vs. Fox.

Case 147.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Injunction. Damages. Uncertainty. Parties.

June 16.

Judge UNDERWOOD delivered the opinion of the Court.

Injunction dissolved, duty of the court to state the rate of damages, the sum on which decreed, being stated; or if the sum be not stated, to calculate and decree the amount. Erroneous to refer the calculation and rate to the clerk.

THE court perpetuated the injunction, in this cause, for $80 50, and for the residue of the judgment enjoined, dissolved the injunction "*with damages*," but without saying at what rate, or upon what sum they should be calculated. This is erroneous, and the only error we perceive. It is necessary to state the rate of interest in a judgment, and it is equally so, to state the rate of damages, where the sum, on which they are to be calculated, is named. Courts ought to fix and liquidate the damages, and state the amount awarded upon the face of the record; or the sum on which they are to be calculated, must be so stated, and the rate of the calculation given. We cannot tolerate the practice of referring to other records and papers, for the amounts on which damages are awarded, and leaving it to the clerk, to make the calculation, according to the rate prescribed, and to issue execution. If a motion should be made to quash such an execution, because it issued for an erroneous sum, instead of testing it by a direct comparison, with the face of the record, it would be necessary to examine into the correctness of the clerks arithmetical skill, and the soundness of his judgment in selecting the proper data upon which to make the calculation, preparatory to issuing the execution. Our judicial proceedings, ought not to be thus regulated. Every judgment and decree ought to contain certainty upon its face. Without it, the loss of a paper referred to, and the occurring casualties, in the progress of time, might, in a few years,

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leave on our records, many judgments and decrees which could not operate, because the paper referred to, was lost or mislaid.

Decree reversed, and cause remanded for a decree to be rendered, not inconsistent with this opinion. The plaintiff in error must recover his costs.

Turner, for plaintiff.

Head vs. Overton.

CHANCERY.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 148.

Mortgagor and Mortgagee. Loan. Usury. Rule of liquidation of interest, and rent of mortgaged property.

Judge ROBERTSON delivered the opinion of the Court.

June 17.

IN March 1822, Overton loaned to Head, $300, in notes of the bank of the commonwealth, for three years; for the consideration of which, it was agreed, that he should have the occupancy of a small tenement, of about 12 acres of land, which belonged to Head. To authenticate this contract, and secure the re-payment of the $300, Head executed a mortgage to Overton, in which he agreed to pay him, at the end of three years, in currency, of value, equal to that of the commonwealth's paper, at the date of the loan. Overton rented the tenement to Gayle, for $30 a year in commonwealth's paper.

A lends B $300, in common'ths. paper, payable in 3 years, in a medium equal in value to that loaned: B mortgages to A, land to secure the re-payment, the use of which is to discharge the interest. Upon bill by B, to redeem and charge of usury, decreed, that B must pay A, the value of the $300, at the date of the loan, in specie, after deducting the excess of the rent of the mortgaged premises, over the legal interest. Ruled, that

And in August, 1825, Head filed his bill in chancery, to redeem the property, and claimed a credit for $75 a year, for the use of it.

Overton admits the allegations of the bill, except that which represents the rent to be worth $75. He says, that it was not worth more than $1 50 cents an acre in specie. He made his answer a cross bill, on which he prayed for a foreclosure of the mortgage, and a sale of the property.

The court decreed, that Overton was entitled to $300, in notes of the bank of the commonwealth, he having agreed to accept this paper, and decreed a sale of the mortgaged property, in the event of a failure by Head, to pay the $300, on or before the first day of the term of the court, succeeding the decree.

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HEAD vs. OVERTON.

To reverse this decree, this writ of error is prosecuted by Head.

the rent actually received by A, for the mortgaged premises, constituted the measure of his accountabilty.

We do not entirely concur with the circuit court. Nor can we concur with the counsel for Head. The one has gone too far; the other is not willing to go far enough. The court exceeded its authority, and disregarded the evidence, in decreeing the payment of the $300 in commonwealth's paper, and in refusing to allow any credit, beyond the accruing interest, for the annual profits of the land.

The counsel for Head, insists on a decree, only for the specie value of the paper, when it became due; and demands a credit, for much more than the amount for which Overton rented the land; in which, if he were to succeed, he would nearly, if not wholly extinguish the debt.

The loan mas made, before the passage of the act, authorizing judgments and decrees, on endorsement for bank paper, specifically. Without deciding whether, the chancellor could decree a specific execution of a contract, made in 1822, simply to pay commonwealth's paper, the contract in this case, furnishes the rule for the decree between the parties. As the mortgage stipulates, that the $300, shall be refunded in a currency or medium, of a value equal to that of the commonwealth's paper, at the date of the loan, this value, whatever it may be, must be the standard by which the amount, to which Overton is entitled, must be measured.

The decree should be, that Head pay to Overton in specie, the amount which $300, in commonwealth's paper, may be proved to have been worth, at the date of the loan. And as Overton received for the place $30 in commonwealth's paper annually, if this amounts to more than six per cent. on the value of $300, in March 1822, the principal should be credited with the excess. In making this estimate, the $30, for the rent must be reduced to its value in specie, at the times the rents were respectively paid to Overton. As Head is liable by his contract, for the specie value of $300, in commonwealth's paper, in March, 1822, he must pay six per cent. interest, on that value. When the paper had fallen to "*two for one*," the $30 for the rent,

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would be very little, if any more than six per cent. on the loan. But it was generally during the three years, at the rate of exchange, which would make $30 of it, worth more than six per cent. on the value, when loaned, of the $800. For the first year particularly, the $28, which were paid to Overton, in advance for the rent, would be $10 in paper, and its equivalent in specie, more than the legal interest. But whatever the difference annually may be ascertained to be, whether it shall be much or little, credit must be allowed for it.

Overton is not responsible for more than the amount, which he received. The doctrine is undeniably established, that a mortgagee in possession, is not chargeable for more than the profits which he receives. Therefore, Overton is entitled to whatever his $300 were worth, when he loaned them to Head, and must be charged with the annual excess of $30 in commonwealth's paper over six per cent. interest on that value. This must be the decree.

Wherefore, the decree of the circuit court is reversed, and the cause remanded for a decree, conformable to this opinion.

Denny, for plaintiff; *Triplett*, for defendant.

The counsel for the plaintiff, filed the following petition, for a re-hearing.

Petition for a re-hearing.

The counsel for the plaintiff would respectfully ask the court, for a reconsideration of so much of the opinion as relates to rents and profits, to be accounted for by the defendant.

The court has fixed the rent at $30 per annum, in commonwealth's paper.

The depositions prove, that the house and garden alone (about 1 1-2 acres) were rented to Gayle for three years, at $30 per annum; the mortgaged premises consisted of twelve acres. It is also in proof, that nine acres were rented to Ransdale, in 1823 and 1824, for 22 1-2 barrels of corn, per annum; the corn is proved to have been worth, in 1823, $2 per barrel, and in 1824, $1 50 per barrel.

It would be satisfactory to the counsel of Head, and probably, would be best calculated, to reach the jus-

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FOURNOY vs. RUBEY.

tice and equity of the case, for the court, so to modify the opinion, as to leave the amount of rents open, and to be ascertained by the circuit court, upon further proof.

Upon which, the court delivered the following supplement to their original opinion.

Since the opinion in this case was delivered, the court has ascertained by a re-examination of the record, that enough was not allowed for the profits of the land. It seems that the rent of $30 in paper, was given for only the houses, and a small part of the land; and it is proved by one witness, that he rented the remainder of the ground two years. This fact had been inadvertently confounded with the other renting. The court supposed, that both were for the same land, the whole 12 acres.

The opinion and mandate, must therefore, be so far modified, as to apply to, and include the rent for the whole of the ground; as however, the value of the rent, received by Overton for the arable ground, is not certainly ascertained, the circuit court, will take proper measures to establish it.

MOTION.

Case 149.

Flournoy vs. Rubey.

Appeal from the Scott circuit; JESSE BLEDSOE, Judge.

Sheriff. Deputy. Execution. Evidence.

June 17.

Judge ROBERTSON, delivered the opinion of the Court.

To charge a sheriff for a failure to return an execution, it is necessary to prove that the person to whom it was delivered, was his deputy.

THIS was a motion by Rubey against Flourney as the Sheriff of Scott, for the failure of his deputy to return a *fieri facias*, which had issued in favor of Rubey vs. Winer, and had been delivered to the deputy.

The notice and its service are sufficient. And the proof is satisfactory to shew the delinquency charged in the notice. The circuit court therefore, gave judgment against Flournoy for the amount of the execution, and 30 per cent damages. He has appealed to this court; and we will be constrained to reverse the judgment; because there was no proof that the individual to whom the execution was delivered, was the deputy of Flour-

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noy. The authority of the cases of Slaughter vs. Barnes, 3 Mar. 412, and Poague vs. Calvier, 5 Litt. 133; is decisive of this point.

VANMEETER vs. WILLIAMS'S ADM'RS.

The judgment is therefore, reversed and the cause remanded, for another trial on such evidence as may as may be again adduced by either party.

Chinn, for the appellant; *U. B. Chambers*, for appellee.

Vanmeeter vs. Williams's Administrators.

CHANCERY.

Error to the Hardin Circuit; PAUL J. BOOKER, Judge.

Case 150.

Lost Bond. Fraud. Chancery. Jurisdiction. Parties.

June 17.

Judge ROBERTSON delivered the opinion of the court.

A and B are joint purchasers of land, from C; A sells his interest to D: D substitutes his bonds with C, for the price; B and C lay off to D, a given quantity as his proportion. Upon bill, filed by the adm'r. of D, to have a credit for deficiency in the land, upon the charge of fraud in representation, B, and the heirs of D, are necessary parties.

VANMEETER sold a tract of land to M'Clain and Ray, and executed his bond for a conveyance to them by deed of general warranty. M'Clain sold his interest in the land to H. Williams, and assigned to him the bonds. Williams, Ray and Vanmeeter, laid off by metes and bounds, 102 acres for Williams, and he executed his notes for the consideration, (which was $5 an acre,) in lieu of M'Clain's obligation therefor. Williams paid the amount of his bonds before his death, except a balance on one note for less than $100. After his death, Rudd, as assignee of this unsatisfied bond, sued and obtained judgment against the administrators; who thereupon, filed their bill in chancery against Rudd and Vanmeeter, alleging that the bond was lost; that there was a deficit of twelve or fifteen acres in the tract of land sold to Williams. That this deficit resulted from the fact, that the claim of Vanmeeter did not include a piece of land of about fifteen acres, which he represented to be within his boundary, and which was worth at least double as much as the same quantity in any part of the tract included within his lines. That he practiced a fraud in the sale, &c.

On this bill an injunction was granted to the judgment at law. On the final hearing the injunction was dissolved, and a decree rendered in favor of the administrators for $120 against Vanmeeter, that being the amount of the value of twelve acres, which appear-

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ed to be the quantity of the deficit. To reverse this decree, Vanmeeter has prosecuted a writ of error.

There can be no objection to the equity of the decree. It was right to dissolve the injunction; because there was neither proof nor allegation which could give any right to an injunction against Rudd. But as to Vanmeeter, the case is different. As to him the allegations are proved, and they are sufficient to authorize the chancellor to decree against him the value of the deficit. The decree has not transcended the proof. The fraud gave jurisdiction. Without fraud, the loss of the bond gave jurisdiction to chancery. No proof of the loss, other than the affidavit thereof, appended to the bill can be required or expected. The tenor of the bond as set forth in the bill, is acknowledged by the answer. There can be no doubt that the court not only had jurisdiction of the case, but that its decree was justified and even demanded by the proof, if proper parties had been before the court.

But the decree must be reversed for a defect of parties. Ray should have been a party, because he was a joint purchaser; and although there can be no doubt he assented to the division and demarcation of the parcels to himself and Williams; yet this was an arrangement *en pais*, and the decree in favor of Williams and against Vanmeeter, would not conclude Ray or affect the rights which he acquired by the bond.

The heirs of Williams were also necessary parties. They are not bound by the decree rendered in this case. The land descended to them. The administrators had the right to sue for damages, because the cause of action accrued to Williams in his lifetime. It accrued instantly on the purchase. But when they shall have recovered in their suit for the deficiency in the quantity of acres, what becomes of the residuum embraced in the boundary of Vanmeeter? Are the heirs bound to accept a deed for it, or may they still ask (if they shall elect to do so,) a recision of the contract and damages for the breach of the bond, in lieu of a specific execution "*pro tanto*"? These and other questions may arise; all of which, will shew that before complete and effectual justice can be done, the heirs must be made parties to the suit. Then if they

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agree to accept a title for the land to which Vanmeeter has a good right, there can occur no further or other difficulty in future. If they shall be unwilling to accept a title, then the court will be able to dispose of the whole case among all the parties in such a manner as shall be just, and prevent any future controversy.

Decree therefore, reversed, and the cause remanded for the proper parties to be brought before the court.

Chapeze, for plaintiff; *Darby*, for defendants.

Davis vs. Ballard.

COVENANT.

Error to the Madison circuit; GEORGE SHANNON, Judge. Case 151.

Writ of error. Limitation. Statute. Constitution. Jurisdiction. Covenant. Pleading.

Judge UNDERWOOD delivered the opinion of the Court. June 17.

On the 23d of November, 1818, Davis and Ballard entered into a written contract, by which Davis agreed to convey certain lands to Ballard, who stipulated to pay $35 per acre therefor, as far as 200 acres, but all over that quantity, Ballard was to have without paying any more. Ballard agreed to pay $1000, on the 1st March, and $2000, on the 1st September, ensuing the date of the contract, and for the balance, $4000, Ballard, in the language of the contract, was "to execute his notes, to the said Davis, in four equal annual payments, from the day he gets possession." Davis agreed to deliver possession on the 10th September, 1819, and bound himself to make a general warranty deed, upon Ballard's making the foregoing payments.

On this contract, Davis instituted an action of covenant, assigning for breaches. 1st. The non-payment of the $2000, on the 1st September. And, 2d. A failure to execute the notes for the $4000, payable in instalments, as required by the contract. The declaration averred, that possession was delivered on the 10th September, 1819. The trial was had on two issues, one found for the plaintiff, the other against him. On the verdict, the court rendered judgment, on the 11th of March, 1823. On the 19th of March, 1827, Davis

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sued out his writ of error, to reverse the judgment. Ballard pleads in bar of the writ of error, that it was brought and sued out, after the expiration of, and not within three years next after the judgment was rendered, in the inferior court.

The validity of this plea, is the first question for consideration. It presents matter, alike new and important, and in the settlement of which, we are in a great degree, unaided, by the learning of those who have preceded us, in this or any other judicial tribunal. We have found no direct precedent, to direct us. It is a question growing out of the judicial embarrassments, which unfortunately existed in Kentucky, and the acts passed by the legislature, with a view to remedy the evil. We are urged in argument, *to declare* the remedial act, inoperative, upon the ground, that it violates the constitution of the state. To decide questions of this character, is often an unpleasant task; but when they are fairly presented, they should be disposed of, with that moral firmness, which arises from pure motives, and a conscious devotion to official duty. The fear of displeasure, and the hope of temporary applause, should have no place in the bosom of the judge.

Limitation of writs of error, 1 Dig. 390: Session acts, 1826, p. 30.

It is declared by an act of 1816, that "no writ of error shall be brought or sued out, from any court in this commonwealth, to reverse the judgment or decree of any court of law or equity, hereafter obtained, except in three years, next after the judgment or final decree, and not thereafter, any law to the contrary notwithstanding." A proviso saves the rights of infants, *femes covert*, and persons of unsound mind. See 1 Dig. 390. The second section of an act, approved, January 11th, 1827, declares "that in writs of error, already sued out, or which may be hereafter sued out, that the period between the 31st day of November, 1824, and the 1st of April, 1827, shall be deducted from the time allowed by law, in any plea, motion or suit, in which the statute of limitation of writs of error may be plead or relied on." See session acts, 1826, 30. It is perfectly clear, under the first act referred to, that it would be the duty of the court to sustain the plea, in bar of the prosecution of the writ of error,

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But if the act of 1827, cited, is operative, and the time between the 31st November, 1824, and 1st April, 1827, should, under the provisions of that act, be properly excluded, from the computation, and not counted as any part of time, out of which to make up the period of the three years, by which a writ of error may be barred, under the act of 1816, then, as there would not be three years, from the date of the judgment, to the date of the writ of error, the plea should be regarded as no bar. It has been contended that the expression in the act of 1827, requiring the period between 31st November, 1824, and 1st April, 1827, to be *deducted* from the time allowed by law, &c. was used by the legislature, with a view to shorten the limitation to writs of error, and that it would do violence to the intent of the legislature, as well as to the most obvious meaning of the words employed, to express that intention, if such a construction should be given to the sentence, as would prolong the time allowed for the prosecution of writs of error.

The act of 1827, Session acts, 1826, 30, does not repeal the act of 1816: 1 Dig. 390.

The time for suing out writs of error, is not abridged. The period from 31st Nov. 1824, till 1st April, 1827, is not to be computed, but to be deducted.

We confess that the language used, has not been well selected, to convey most clearly, the idea intended to be expressed. Nevertheless, we think it sufficiently obvious, what was meant, to enforce that meaning, if the second section of the act, be not unconstitutional. The act of 1827, does not purport to repeal the act of 1816, and to substitute any shorter limitation to writs of error. The limitation of three years is to remain, but when that is relied on, in "any plea, motion or suit," the period specified is to be *deducted*, and not to compose any part of the time relied on, in such plea. There must be three years without computing it. The plea, in this case, relies on the time running between the 11th March, 1823, and 19th March, 1827, as being three years and more; but *deduct*, or take away from it, the period between 31st November, 1824, and 1st April, 1827, and there will not be three years left, to constitute a bar, as the law requires. The whole tenor of the act of 1827, shows this to be the proper construction. If, therefore, the act be compatible with the constitution, we must decide against the plea, and proceed to adjudicate on the errors assigned.

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The duty of the judiciary to protect private rights and private property, from any unconstitutional invasion, by legislative enactment, whether it result from accident or design.

The clause of the constitution, immediately and directly violated by the act of 1827, has not been pointed out in argument; several have been mentioned incidentally, but it is mainly insisted, "*that it violates the spirit of the instrument, by invading Ballard's right of property, the protection of which, constituted one of the leading objects, which induced the people in convention, to form a constitution, as is manifested by the preamble.*" There is no clause in the constitution of Kentucky, which, in so many words, declares that the legislature shall not exercise the power of divesting one citizen of his property, and giving it to another. The omission to insert a positive and direct restriction on legislative power, in this respect, may have proceeded from the belief, on the part of the convention, that a thing so destitute of moral principle, so corrupt in its tendencies, and so destitute of confidence in the justice of the government, would never be attempted. We cannot suppose that the representatives of the people, will ever debase themselves, in the estimation of the virtuous living, and render their memory infamous with posterity, by wilfully and corruptly seizing and depriving one citizen of his property, or vested rights, for the purpose of enriching and benefitting another.

If such a case should happen, charity requires; the honor and reputation of the country require, that it should be attributed to a negligent exercise of that wise forecast and deliberate consideration of consequences, which should always characterize legislators. It is to be regretted, that the exercise of much caution, even in deliberative assemblies, composed of many members, owing to the multitude of objects requiring attention, and the frailties incident to human nature, cannot always be brought to operate on every measure, so as to detect all resulting evils. Whenever, through the haste or inadvertence, or design of the legislature, it shall occur, that the right of the citizen has been invaded, contrary to the constitution, it is the duty of the judiciary to shield him from oppression. Although private property is not protected from legislative grasp, by any positive and express clause, prohibiting the general assembly from transferring the real or personal estate of one citizen to another, without consideration, and without the consent of the owner; yet, we think

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that the exercise of such a power, would be unconstitutional, and that it would be the duty of the judiciary, to refuse obedience, to every such legislative act, whether it be designed to operate on the rights of one only, or on the rights of a particular class of individuals. To put two palpable cases by way of illustration. If the legislature were to pass an act, declaring that the farm, the slave, or the horse of A, should henceforth belong to B, and that the latter might institute the appropriate suit, in a court of justice, to recover the possession of the property, ought not the court to declare such act unconstitutional, and refuse to effectuate it? If the legislature were to pass an act, to deprive all merchants, or all mechanics of their property, and to vest it in the farmers, should courts of justice lend their aid to execute the act? These, and all similar enactments, in our opinion, would be unconstitutional, and we shall assign, with all practicable brevity, the reasons for such opinion.

Object of the framers of the constitution, to secure the enjoyment of life, liberty & property, and the pursuit of happiness.

The present constitution of Kentucky, was adopted at a time, when the natural, civil, and political rights of men, were well understood. The object in forming the constitution, was to protect these rights from encroachment, and as declared in the preamble, "to secure to all the citizens of the state, the enjoyment of the right of life, liberty, and property, and of pursuing happiness." To preserve these great ends of all government, three distinct departments were instituted; each to consist of a separate body of magistracy, neither to be supreme in itself, but to act in its appropriate and prescribed sphere, the one wisely permitted to check the other, when that other may overleap the limits assigned to it; and the whole, together, representing the great body of the people, from whom their powers are derived, and in whom all power ultimately rests.

The enjoyment of life, liberty, and property, and the right to pursue happiness, embrace all the comforts and pleasures which man's physical, intellectual, and moral nature is capable of acquiring, by the application and exercise of the various faculties with which he is endowed, and all that the world can afford him. The right to pursue happiness, includes the right to

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use all means necessary for its attainment, by the proper exercise of our faculties. The acquisition of property, to some extent at least, is indispensable to our most limited ideas of happiness. Food and raiment are property; and without food and raiment, existence cannot be preserved many days. Whether our acquisitions shall be limited to a bare subsistence, or shall be multiplied to the accumulation of every luxury, will depend upon the degree of labour employed, and the success of the business to which it may be directed; but it equally results, whether we have much or little, that one of the objects in the formation of the constitution, was to secure the enjoyment of that which we do possess and own. "We, the representatives of the people of the state of Kentucky, in convention assembled, to *secure* to all the citizens thereof, the *enjoyment* of the rights of life, liberty, and *property*, and of pursuing happiness, do ordain and establish this constitution for its government," is the language of the preamble.

The 12th and 13th sections of the 10th article of the constitution, indicate the duty to be performed by the functionaries of the government, in the protection of the citizen.

If a man owns a farm, a slave, or a horse, food or raiment, the government was instituted to *secure* him in its *enjoyment*. If the government does not afford this security, it fails to perform one of the duties of its institution. If this right of property is invaded by the hand of violence, it is an injury to the owner. If the improvements on my farm are demolished, and my personal property forcibly taken from me, by a wrong doer, and these injuries are not redressed by the government, it cannot be said, that I am secured in the *enjoyment* of my *property*. As applicable to cases like these, the 13th section of the 10th article of the constitution, speaks in language not to be misunderstood, and is clearly indicative of the duty, which the functionaries of the government owe to the citizens. "All courts shall be open, and every person, for an injury done him, in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered, without sale, denial or delay."

The 12th section of the same article, also shows the great regard paid to the right of property by the constitution. It declares that "no person shall, for the same offence, be twice put in jeopardy of his life or

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limb; nor shall any man's property be *taken* or applied to public use, without the consent of his representatives, and without just compensation being previously made to him." It is perfectly obvious, that if these words, "*or applied to public use*," had been omitted in the construction of the sentence, it would have been a positive and express prohibition, upon the power of the legislature, to deprive any man of his property, under any pretext, without the consent of his representatives, *and* without just compensation being *previously* made to him. The consent of his representatives alone, would not be sufficient to justify the act of deprivation; that consent and compensation to be previously made, are coupled together, by the copulative conjunction. Both must exist, anterior to taking the property, to render the taking constitutional.

It is remarkable that the disjunctive conjunction *or*, is used after the word *taken*, thereby leaving it doubtful, whether the taking of property contemplated by the section, had reference exclusively and entirely to the taking of property for *public uses*, or whether it did not mean to prohibit the taking of property for any purpose whatever until its owner was first compensated, and his representatives had also consented to it.

Quere. Does not the constitution, by the use of the disjunctive "*or*," after "taken" in 12 sec. 20 art. inhibit the taking of A's property, and giving it to B, as well as the application of it to public use, without consent and compensation.

It is clear, that if the convention had intended to embrace the taking of property for public uses only, and not to provide against the taking of individual property at the mere will or caprice of the Legislature, from one man or set of men, for the use of others without compensation, that it would have been more compatible with the structure and import of our language, to have used the word *and*, after the word *taken*, than to have used the word *or*. There is certainly more reason to prohibit the Legislature, from taking A's property and giving it to B, without first paying A its value, than there is to prohibit the taking of it for *public use*, without previously making a just compensation. The public exigence in imaginable cases may be such, that individual property may be required from the principle of necessity. In such cases, although it may and would be a violation of law to take it, without first making compensation; yet the maxim *necessitas non habet legem*, ought to excuse from the payment of vin-

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dictive damages and to exclude the idea of felony. It is difficult, if not impossible, to conceive a case where reasons equally strong can be given, in extenuation of the taking of one man's property, without compensation, for the use of another, under color of law, and without the owner having done any act, by which he renders the taking just and proper and legal.

The authority of the cases, Blair vs. Williams, and Lapsly vs. Brashears, 4 Litt. 34 & 47, recognized.

The 18th section of the same article, declares "that no *expost facto* law, nor any law impairing contracts shall be made." The last clause is nothing more, nor less than a prohibition upon legislative power, the better to secure the right of property to the citizen. If a contract entitles a citizen to land or money, or any thing else, it is not to be impaired. All legislative acts, so far as they may impair a contract *lawfully* entered into, are void. If the contract cannot be touched, is it not absurd to suppose that the property paid, in discharge of the contract, becomes less sacred, as soon as it is conveyed or delivered, by the obligor to the obligee. Can the legislature as soon as the obligee receives it, by an act for that purpose, compel him to restore it, (and that too, without compensation,) to the obligor? In the memorable cases of Blair, &c. vs. Williams, and Lapsley vs. Brashears, &c. 4 Litt. 34 and 47, this court has expounded that clause in the constitution of the United States, which declares, "*that no State shall pass any law impairing the obligation of contracts.*" Whatever impairs the *obligation* of a contract, will impair the contract itself, because the obligation contains the essence of all that is valuable in a contract. A contract without obligation, or in other words without a remedy to enforce it, is worthless; or if it possessed any value, it would depend upon the degree of influence which moral considerations might have upon the conscience. By the authority of the above cases, the legal obligation consists in the remedy afforded by the law at the date of the contract for its enforcement. It is this remedy which gives value to contracts.

Any law which would impair the obligation of

We can perceive no reason for declaring any act of the legislature unconstitutional, under the foregoing clause of the Federal constitution, which ought not to be equally condemned, under the constitution of the

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State. Now would it not argue great weakness, if not consummate folly, in the founders of our government, to provide thus carefully for the safety of contracts, against legislative alienations, and at the same time, leave the subject matter of nine tenths, if not ninety-nine hundredths, of all contracts, to-wit: property, completely exposed? If such be the result, the substance has been lost in the pursuit of a shadow. But it is our opinion, that the substance is not in danger. For considering the great objects which are designed to be secured, the constitution of our government, as set forth in the preamble to the constitution, and the special provisions already noticed, we cannot resist the conclusion, that it would be a violation of the general tenure and spirit of the constitution, for the legislature to attempt to deprive any citizen of his property, without previously providing compensation therefor. And whenever such acts are passed, we believe it to be the duty of the judiciary to disregard them, and consider them as nullities. We cannot perceive any reason, which, should compel the judiciary to obey a legislative act, at war with the tenor of the constitution, and the fundamental principles for the preservation of which the government was instituted, that would not apply with equal force to produce obedience to a legislative act, directly opposed to any one of the positive inhibitions of the constitution. We grant that the representatives of the people are shepherds to preserve the flock; but they are not exclusively such, although vested with great and extensive powers. If through inadvertence or design, they should endeavor to sacrifice any one or more, as victims, it can not be done, so long as the judiciary remains virtuous, intelligent and independant. Both departments must concur, to work iniquity before the people can be made to mourn, and in bitterness to curse their government. In that mutual check, lies their safety.

a contract, would impair the contract, and equally violate the constitution of Kentucky, and of the United States

It remains to be decided, whether the act of 1827, invades Ballard's right of property, and takes from him, that which is his, and gives it, without compensation, to another. If it does, we disregard it; otherwise, enforce it. The direct operation of the act extends no further, than to permit the prosecution of the writ of error. It does not say that Ballard, shall surrender to Davis any

The act of 1827, Session acts, 30, does not violate any provision of the constitution. The judgment of an inferior

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property. It does not pretend to decide, that Ballard has any property which belongs to Davis. It merely provides in its effect, that this court shall investigate a controversy between Ballard and Davis, which has been acted on in the circuit court, by whose decision Davis complains he has been injured, contrary to law; and if it be proved, that Davis's complaint is true, that this court shall then afford adequate redress, not according to any new principle, established by the act of 1827, to operate retrospectively, but according to the principles of law in force, operating upon the rights of the parties, at the time the circuit court adjudicated upon them. Does this deprive Ballard of any right of property? Surely it does not. Does it impair any contract of his? Certainly not. Davis complains of the judgment in the court below. Until we investigate it, the presumption is, that we shall affirm the judgment. In that event, Ballard will be altogether undisturbed in his rights, and will be entitled against Davis to the costs of this suit. If upon investigation, we reverse the judgment, it will be upon the ground that the court below, erred against Davis and refused to do him justice. If by a reversal, we give Davis full justice and no more, can Ballard complain that any right of his has been violated? Certainly he can not. If he be resisting the administration of justice for Davis's benefit, it must be because he has obtained an unjust advantage by the error of the circuit court. For what then is Ballard contending? For nothing more nor less, than to permit injustice by lapse of time, to ripen into a perfect right. Any law which prevents this cannot be said to violate any principle of the constitution.

court, erroneously rendered, is, at all times, subject to revision & reversal, should the legislature repeal the statute limiting the time for prosecuting writs of error.

Such judgment cannot constitute a property in any individual, to which he can acquire right by laps of time.

It does not create a right, it merely determines conflicting claims, according to pre-existing right.

The revising court inquires what was right between the parties, in the original controversy?

We know that statutes of limitation have been construed as permitting claims, originating in injustice, to grow into perfect rights, by the acquiescence of the injured party, during the prescribed period. Laws of this character, originate in considerations of public policy, and when enacted to operate prospectively, promote the peace and well being of society, without invading the rights of any. If we were willing to concede, that the repeal of a statute of limitation, would not authorize the original owner of the property, to prosecute a suit with success, against the holder whose

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right had been perfected by the statute while in force, even if the legislature were to declare in the repealing act, that the statute should not be relied on or constitute a bar; yet, we conceive, that there may be such a difference between such a repealing statute, and the statute now in question, as to constitute the latter an exception to the principles which at first view, would seem by analogy to apply to both. Under the operation of our ordinary acts of limitation, the holder, by virtue of the statute, may acquire such a perfect right in the thing, in the property, as should place it in all respects in the attitude it would be in, had he always owned it. Why may an ordinary act of limitation have this effect? Because, it co-operates with nature, aiding the title by occupancy, which is the original and most substantial foundation upon which the right to an exclusive dominion in and to the use of a thing can be placed. Occupancy in the face of the world, makes a sensible impression; and the title thus enforced under the sanction of law, is recognized by the unhesitating common sense of mankind. But an erroneous judgment, is not possessed, like real or personal estate. One party does dot exclude the other in respect to it. He does not seize upon it against the right of the other. Neither has any control over it. It does not strike the senses of men like a tract of land, or any personal article; and therefore, does not admit that any one by lapse of time, can acquire such a right in an erroneous judgment, of an inferior court, as to give him a property in the judgment, so as to render it irreversable by this court, after the lapse of the time limited, by law, for the prosetion of a writ of error, in case the legislature think proper to provide for the review of such judgments. We apprehend that the judgment of a court cannot with propriety, be denominated the property of any individual. A judgement or decree of a court, does no more, than decide between parties, their liabilities to each other, their rights of property, and their respective duties, according to the laws operating upon the subject of controversy. The decision is authoritative by the judge, but it does not give or create rights, it only determines pre-existing rights in such form, so that they can be enforced by execution or attachment.

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The parties in an appeal or writ of error before this court, may still contend for their rights, as fixed by law at the commencement of the suit; but that does not satisfy Ballard, he is willing to abandon them as they stood before the judgment, and to rely on that judgment and the matter of his plea, as creating a property in him which cannot now be called in question. We think he has no such property, and that the act of 1816, providing a limitation of three years, which had fully expired before the act of 1827 was passed, did not give such a vested right in the subject matter of controversy or in the judgment as to render the latter act a violation of the constitution.

The limitation, upon the time of prosecuting a writ of error, is a *restriction* by law, of a general right to take jurisdiction; the repeal of that limitation is a *regulation* by the legislature, restoring that right. The regulations of the time of suing out writs of error and the sums for which to be prosecuted are, by the constitution confided to the legislature

The second section of the fourth article of the constitution, declares, that "the court of appeals, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under such *restrictions* and *regulations*, not repugnant to this constitution, as may, from time to time, be prescribed by law." The court of appeals was created by the constitution, as the tribunal of last resort, to which every citizen might appeal or prosecute writs of error. By the institution of the court, uniformity in decisions, throughout every branch of the judiciary, is secured, and a mode of settling controversies provided, admitting of more deliberation, from more minds, than can be given to a case, in the hurried proceedings of inferior courts. Hence, there is greater reason to believe that exact justice will be administered between parties here, than in the inferior courts. Every citizen has an unquestionable constitutional right to bring his case, no matter how important or trifling it may be, before us for adjudication, subject only, to such *restrictions* and *regulations* as the legislature may prescribe by law. If the legislature should prescribe none, the appellate jurisdiction of this court would be unlimited. The limitation to the prosecution of a writ of error, is a *restriction*, in point of time, prescribed by law. If that *restriction* is removed by another law, this is no more than a *regulation*, by which the original right to take jurisdiction is reinstated. The constitution expressly authorizes the legislature to impose *restrictions*, and by *regulations* to remove them, provided nothing repugnant to the constitution shall

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be done At one time the prosecution of writs of error to reverse judgments, for sums less than fifty dollars, was prohibited by law. This law was repealed, and now a writ of error may be prosecuted to reverse a judgment for one cent. Suppose a judgment, while this *restriction* on our jurisdiction was in force, had been rendered for forty dollars, would the defendant in such judgment have a right to prosecute his writ of error after the prohibitory act was repealed, at any time, until he was barred by the statute of limitation? We think he would have such right. Precisely the same argument might be made against it, as is relied on in this case. Without a change of the law, no matter how erroneous the judgment for the forty dollars might be, it could not be reversed; by the reversal the plaintiff would be deprived of forty dollars, and on that account, might reiterate all the arguments used on this occasion, to show that the constitution was violated by the repealing act. We cannot view the laws which the legislature pass, limiting the jurisdiction of this court, again enlarging it, fixing the time within which writs of error shall be prosecuted, and then altering it, in any other light than as *regulations*, which the legislature may make, from time to time, as it may please. If a judgment shall be rendered during the present year for a cent, and the legislature should, at its next session, think proper to pass an act, prohibiting us from entertaining jurisdiction in the revision of the cause, on account of the trifling sum involved, we perceive nothing which should render a disregard of the law proper on our part. In such a case it might be contended, that as the judgment was rendered at a time when the law permitted the prosecution of a writ of error, that it was as much a violation of private right, and the principles of the constitution, to prohibit an investigation before this court, as it is to open a case for investigation after it has been closed.

It has been urged in argument, that it would be extremely dangerous to settle a doctrine, which would tolerate the legislature, from mere whim and caprice, to open all cases decided by the inferior courts since the foundation of the government. If those who advance the argument, could prove, that the legislature were always, or even frequently under the dominion of

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whims and caprices, it might occasion regret, that the framers of our constitution did not oppose a barrier to such mischiefs. We are to decide what the constitution is; not what it ought to be. The members of the legislature are responsible to the people, for any criminal indulgence of whim and caprice, in making laws, and not to us. We have to incur responsibilities enough, to our consciences and to our country, without overleaping *our duty*, to prescribe rules which may prevent others from violating *their duty*. It is just as unreasonable to suppose, because the legislature has the power, under the constitution, to prescribe regulations settling the cases over which our appellate jurisdiction shall be exercised, that they will permit no case to be brought before us, unless it be of the value of $100,000, as, that they will permit every case to be brought up, from the foundation of the government. These things depend on the legislative will, which we are bound to obey, whenever it is not in conflict with the constitution.

Blackstone's definition of *law*, not applicable to the character of our institutions, and the restricted power of the legislative department.

It has also been contended by Ballard's counsel, that the act of 1827 is unconstitutional, because it operates retrospectively upon his case. "Law, signifies a rule of action," and in its most general and comprehensive sense, is applied indiscriminately to all kinds of action. Municipal law may be properly defined to be *a rule of civil conduct, prescribed by any power in a state, having, according to its constitution or form of government, authority to act.* Blackstone's definition has been departed from, so far as he makes *law* depend on the *supreme power* in a state. Such a definition is not compatible with the genius of our forms of government, neither is it literally true as applicable to our system. We acknowledge no *supreme power*, except that of the people. "Sovereignty and legislature are *not* convertible terms in this state, whatever they may be in England; and one actually does subsist without the other, which is denied by Blackstone. See 1 Com. 46. Instead of the legislature being *sovereign*, (a term to which we usually annex the idea of authority, without or beyond control,) it is limited in its power over many important subjects, which deeply concern the welfare of society, both by the state and federal constitutions. If trans-

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tending these limitations, the legislature should attempt to prescribe *rules of civil conduct*, the enactment is void.

The legislature possesses the *highest* power in making laws, but it cannot be said to be a *supreme* power, a term used, no doubt, by Blackstone, in reference to the "*omnipotence*" of a British parliament, and the monarchical governments of Europe. Trustees of towns and the agents and officers of corporations, may rightfully exercise the law making power, in many cases. The rules of civil conduct, prescribed by these law makers of inferior grade, are not the less obligatory, because they have not been directly prescribed by the general assembly. It is true their powers must be derived from the general assembly, but as Blackstone's difinition seems not to have included rules of conduct, prescribed by *derivative* power, we have thought it not improper to define what we mean by *law*, as applicable to our republican, representative system of government. Our constitution is the *supreme* law, prescribed by the *supreme* power. Our other laws do not come up to Blackstone's definition.

"Law" is a rule of civil conduct, prescribed by competent authority.

As law, then, is a rule of civil conduct, prescribed by competent authority, can it, in the nature of things, be a rule by which any man can regulate his civil conduct, in times, past, before the law was enacted? It is impossible for any one to regulate his conduct, by a rule which has no existence; it, therefore, follows of necessity, that laws can only influence the conduct of men, after they are made. If the legislature attempt to apply their acts to the conduct and transactions of men, which took place before the passage of the law, so as to inflict punishment, it cannot be done. The constitution expressly forbids it, when it says, "no *ex post facto* law shall be made." But we cannot give to this clause the effect contended for in argument; we cannot enlarge its operation, so as to make it a positive restriction, upon the power of the legislature to pass retroactive laws in all cases.

The supreme court of the United States, in the case of Calder and ux. vs. Bull and ux. 3 Dallas, 386, have considered the meaning of the clause in the constitution of the United States, which prohibits the states

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DAVIS vs. BALLARD.

from passing *ex post facto* laws, and have decided that it related entirely to criminal matters. Judge Chase mentions four kinds of laws which, in his opinion, would be embraced by the prohibition: 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; and, 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. The exposition of the supreme court of the nation, on this subject, has been regarded as binding authority, since 1798, when the opinions of the judges were delivered, and we are not disposed to give any efficacy to the prohibition, beyond criminal matters.

The act of 1827, does not divest any right, or infringe the restrictions as to "*ex post facto laws*," or laws impairing the obligation of contracts, or impairing contracts, either in the constitution of the United States, or of Kentucky, & is valid.

This court, in the case of Fisher vs Cockerill, 5 Monroe, 133, has acquiesced in the correctness of the decision of the supreme court. But this latter case, is nevertheless, strongly opposed to the sanction of retrospective laws. In that case, the court enforced the provisions of the act of 1820, relative to occupying claimants, after it had been repealed, and they refer to many cases, both of the English and American courts, and to the doctrines of the civil law under the Cæsars, and also to the code of Napoleon, for the purpose of shewing, that "all governments, which can pretend to any civilization, have repudiated the principles of retrospective laws." We shall not pretend to deny, that retrospective laws, are in the general, impolitic, and unjust. They are ridiculous, when they attempt to prescribe rules, for the past conduct of men; and we believe them unconstitutional, whenever they endeavour to deprive a citizen of a vested right of property, rendered full and perfect, by the existing laws, at the time of the passage of the retrospective act, which may contemplate a divestiture of such right. Laws when passed, may vest inchoate, or perfect rights in a citizen. The repeal of such laws, cannot repeal or take away the right. All the cases which are re-

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ferred to in Fisher vs. Cockrill, seem to us, to lack analogy, to the present, in one most essential particular. DAVIS vs. BALLARD.

In the present case, the act of 1827, does not prescribe any rule of action for Ballard. It does not pretend to take from him, any right, nor to repeal any law, which invests in him any right. It only provides, that a certain period, memorable in our judicial history, shall not be counted; and to whom is the direction given? who is to be governed by it as a rule of action? Surely, the direction is to this court, and it operates on us, as a *prospective regulation*, which does not affect the rights of Ballard, in any manner whatever. In this respect, the present case seems to us, to differ essentially from any to which we have been referred.

This court, in the case of the commonwealth vs. M'Gowan, 4 Bibb, 64, decided, that if a right existed without a remedy to enforce it, that it was competent for the legislature to afford remedy, by a re-troactive statute. The act of 1809, referred to in the decision, did re-troact and operate upon facts existing, long anterior to its passage, whereby, M'Gowan was deprived of money, which, without the statute he would have held. The court first determined, that the statute of limitations did not run against the commonwealth, consequently, no right could vest in M'Gowan, by the running of the limitation. It is even intimated, that the statute of limitations might be repealed, so as to invest those with their original rights, who had been divested by its operation. In Colder vs. Bell, judge Chase very strongly intimates, that "to save time from the statute of limitations *retrospectively*," may be proper or necessary according, to circumstances, and could not be objected to. On these points, it is unnecessary to express an opinion. It is sufficient for our present purpose, to present in the case of the commonwealth vs. M'Gowan, a retrospective act of the Legislature, sanctioned by this court, whereby a citizen was deprived of money, which he would have held, but for the act. It is very common for our legislature, to legalize erroneous proceedings of county courts, by retrospective acts. These have never been called in question, so far as we know. If sound policy, and the

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constitution permits that, why should they prohibit the legislature from authorizing the court of appeals, to correct the erroneous proceedings of inferior courts? The position, that all retrospective legislation, is void, is too broad to be supported. That it is so, whenever it attempts to impose responsibility, *criminaliter*, there can be no doubt; that it is likewise so, when it attempts to invade the right of property, or rights growing out of contracts, we also concede; but further, we are not willing to extend the doctrine. We have already said, that our judicial proceedings, do not create rights of property, but only determine rights previously existing. So long as a judgment or decree, remains in full force, it is conclusive *evidence* of what the right was, and to whom it appertains, and nothing more. Our *statutes*, for instance, providing for the appropriation of vacant lands, and the consummation of the provisions of the statutes by grant, create rights. The decision of a court of justice, that a particular tract belongs to A, and that he shall recover it from B, does not create a right in A; it only decides, that such a right, had been previously created, superior to that asserted by B, and in all future controversies between *them*, the decision is merely conclusive *evidence*. The interest of society requires, that the records of our courts, should exhibit correctness. This court was created to revise and correct the errors of inferior judicial tribunals. The mode of proceeding by which the object is to be attained, depends on the *remedial regulations* made from time to time, by the legislature. Over *remedies*, the legislature has absolute controul; provided, under colour of remedy, life, liberty, the rights of property, or those resulting from contracts are not impaired or prostrated, contrary to the constitution. By the act of 1827, the legislature has done no more than to provide a *remedy*, demanded by the community, to heal the wounds of political warfare. We do not perceive that it does or can operate against any man's right, and therefore, we shall disregard the plea, and proceed to examine the errors assigned. In doing so, the laws in force, at the time of rendering the judgment, as they operated upon the rights of the parties, will govern us. If when tested by these, full justice has been done, Ballard is in no danger. If the judgment

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cannot stand the test, it would be a reproach and a stigma on the government, to say, that it did not possess power to make it right. The question is one of novelty and importance. The ablest men may be divided in opinion upon it. It would therefore, be presumptuous in this court, to express entire confidence in the correctness of the conclusions, to which it has arrived. But surely, it cannot be the province of any court, to vacate the act of 1827, passed with the best motives, for the best purposes, without the clearest conviction of its unconstitutionality.

By the contract on which the suit is founded, it is declared to be understood between the parties, "that a little alteration in the lines of the said survey, will be made, when this contract is closed, and the land surveyed to said Ballard, so as to include a small piece exchanged for, with George Shackelford, and take out the piece, which the said Davis has contracted, to let the said Shackelford have. This being done, the said Ballard is to pay the said Davis, for the aforesaid tract, at the rate of $35 per acre, &c. The defendant's first plea, alleges, the land had not been surveyed, as contemplated by the contract, upon which issue was taken. The second plea alleges, that Davis did not deliver possession of the land on the 10th September, as requred by the contract, nor at any time since. On this plea, issue was likewise taken, by replying, that the possession was delivered on the 10th day of September; 1819, and without gainsaying the averment in the plea, that it had not been delivered at a subsequent time, the jury found for the plaintiff upon the first plea, and assessed his damages to $2420, and they found for the defendant upon the second plea. Upon this finding, the court gave the plaintiff judgment for the damages assessed and costs; and also, *that the plaintiff should recover nothing of the defendant, upon the second breach assigned in his declaration.*

If replication put in issue, a single fact of several presented by a plea, and it be found for

The second breach in the declaration, claimed damages for an alleged failure on the part of Ballard, to execute his notes for the instalments, according to the covenant. It is clear from the covenant, that Ballard was not bound to give his notes, until possession was delivered. Davis having put the fact of delivery of

NOLAND vs. RICHARDS.

possession in issue, and confined it to a certain day, he has admitted that part of the plea, to be true, which avers, that possession was not delivered, subsequent to that day. His declaration does not shew that possession was to be delivered, before that day. The covenant shews clearly, that Ballard was not bound to give his notes, until he got possession. The jury having found, that possession was not delivered, as stated by Davis, the court was right in entering judgment against Davis's right to recover upon his second breach. We do not believe, that this judgment of the court, would bar Davis's right to recover upon a breach, differently assigned, but it is conclusive against him, upon the facts, as alleged in the declaration, and put in issue by the plea and replication. We think the plea a good answer to the second breach assigned, and consequently there is no error in the decision of the inferior court.

def't. it is correct to enter judgment, that pl'tff. take nothing for breach of covenant, to which the plea was an answer.

The questions made and presented by Ballard's counsel, in his brief, need not be considered, as the judgment cannot be reversed on the writ of error, presented by Davis.

The judgment is affirmed, and Ballard must recov' his costs.

Caperton, for plaintiff; *Turner*, for defendant.

CHANCERY.

Noland vs. Richards.

Case 152.

Error to the Montgomery Circuit; SILAS W. ROBBINS Judge.

Injunction. Damages. Practice.

June 17.

Judge UNDERWOOD, delivered the opinion of the Court.

IN March, 1825, the court dissolved Noland's injunction with damages. The amount of damages awarded are not stated upon the record, but they are to be ascertained by reference to the judgment, and a calculation made thereon, at the rate of ten per cent. upon the amount thereof. If in any case, it would be correct to leave the damages unsettled by the court, and refer it to the clerk, in this instance it cannot be sustained; because the criterion furnished

The sum upon which damages are rendered, should be ascertained. Erroneous to leave it to the enquiry and decision of

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as the basis of the calculation, is wrong. The court awarded ten per cent. damages, on the amount of the whole judgment, when the defendant acknowledges a credit. Damages should certainly not be given on the amount credited. It does not appear in the record, what sum was credited. The court should have settled it, and not left it to the clerk. In September, 1827, a final decree was rendered, again dissolving the injunction and dismissing the bill, and awarding ten per cent damages on $64 17 3-4 cents. Why damages should again be given on this sum, does not appear, and why they should be limited to this sum, does not appear. It was clearly erroneous to give damages twice.

the clerk. Error to decree damages twice.

Wherefore, both decrees awarding damages, must be and are hereby reversed and set aside, and the cause remanded.

The plaintiff in error must recover his costs.

Denny, for plaintiff; *Hanson*, for defendant.

Hillyer vs. Vaughan.

CHANCERY.

Error to the Henderson Circuit; ALNEY M'LEAN, Judge.

CASE 153.

Debtor and creditor. Payment. How credited. Election.

Judge UNDERWOOD delivered the opinion of the Court.

June 17.

Debtor has his election, at the time of partial payment, to direct how the credit to be applied, if he do not direct, creditor may make the application.

THIS case was decided upon bill, answer, exhibits and the deposition of Elliott, cashier of the branch of the Bank of the Commonwealth, at Hartford. These facts are established. That Vaughan executed to Hillyer, a note for $20, but at what time does not appear; that Vaughan executed a note for $50 some cents, to R. Streshley, who assigned it to J. B. Pollett, and Co.; who assigned it to Hillyer, who instituted suit thereon and recovered judgment; that Vaughan paid Hillyer $50, on the 14th July, 1823, taking a receipt therefor, in which Hillyer states that he had received the money "*on account*;" and that Hillyer had paid considerable sums of money for the use of Vaughan, to said branch bank, of which, more than $50 had been paid anterior to the date of the receipt.

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HILLYER vs. VAUGHAN.

On the final hearing, the court decreed that the injunction should be perpetuated in part, dissolved in part, and that Hillyer be perpetually restrained from collecting the note for $20; to reverse which decree, this writ of error is prosecuted.

The bill alleges that the $50 were paid to Hillyer with a distinct understanding that they were to be applied, first, in discharge of the $20 note; and the residue to be credited on the note for $50 some cents. This is positively denied by Hillyer, who says the money was received upon and in payment of an open account, as the receipt purports. There is no evidence on the subject, other than that which the receipt furnishes, and the facts already set forth.

It cannot be doubted but that a debtor, at the time of payment, has a right to designate the debt on which the credit shall be given, but if he does not make his election at the time, then the creditor may apply the payment, or it shall be applied, in case of litigation, by the court, according to the dictates of equity. As the allegation of Vaughan is positively denied by Hillyer, we are left to consult the language of the receipt, for the purpose of ascertaining the intent of the parties. From that, we cannot resist the conviction, that the payment was made on an open account, due by Vaughan to Hillyer. The evidence of the receipt, connected with the deposition of Elliott, shows the existence of an open account, for money laid out and expended; and there is nothing in the record which will authorize us to say, that the account had ever been closed by the note for $20, and there was no attempt to show that it had been discharged, unless by the payment of the $50. There is no ground upon which to indulge the conjecture that Hillyer was making voluntary payments to the bank, for Vaughan, so that he was not entitled to reimbursement.

The decree must be reversed, and the complainant's bill dismissed with cost, and his injunction, so far as it had been retained, dissolved with damages. The plaintiff in error must recover his costs.

Denny, for plaintiff.

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Dunn vs. Dunn and Webster.

CHANCERY.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge. Case 154.

Practice in chancery.

Judge UNDERWOOD delivered the opinion of the Court. June 17.

IT was irregular to permit an amendatory answer to be filed in the progress of the trial, and then to proceed with it without giving the complainant an opportunity to contest the matter of the answer; and had it been shown in this case, that the complainant had been prejudiced by it, we should have reversed the decree. But without the amendatory answer the court should have decreed for the defendants, upon the state of the pleadings and proof.

Erroneous to permit amendment in the progress of trial; but if merits not affected, decree will not be reversed.

Decree affirmed with costs.

Loughborough, for plaintiff.

Morgan vs. Boone.

APPEAL.

Error to the Clarke Circuit; GEORGE SHANNON, Judge. Case 155.

Jurisdiction. Statute. Evidence. Set off.

Judge ROBERTSON delivered the opinion of the Court. June 18.

BOONE sued Morgan in a warrant, before a justice, on an account for $18, with a credit endorsed for $10.

Notice of set off to a demand, by warrant, which would not give an appeal to circuit court, judgment for defendant for more than five pounds, pl'tff. may appeal to circuit court.

Morgan gave Boone a notice, in writing, that on the trial, he would plead his account against him, for $45, which was stated, as a set off, and demand a judgment against him, for the balance which should be ascertained to be due.

On the trial before the justice, Morgan obtained a judgment against Boone, for $21 93 3-4 cents. Boone appealed to the circuit court. On the trial in the circuit court, without pleading, in writing, no other testimony being introduced by Boone, than his and Morgan's accounts, and the notice of set off, the counsel for Morgan insisted that this was not admissible evidence; but the court decided that it was proper evidence, for the consideration of the jury. It being then suggested by the counsel for Morgan, that if the

Upon appeal from justice of the peace, appellant must prove his account, tho' judgment for appellee, upon set off.

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MORGAN vs. BOONE.

Notice of set off does not admit pl'tffs. demand, tho' special plea of set off does. Notice of set off only admissible under general issue.

evidence were admissible, as it was, in writing, it was the province of the court to decide on its legal effect; the counsel for Boone, agreed that the court might instruct the jury peremptorily. The court thereupon instructed the jury, that the two accounts and the notice of the set off, were conclusive evidence, to establish the account of Boone. The counsel for Morgan, then asked for leave to argue on the effect and weight of this evidence, before the jury, which the court refused; and thereupon, the jury retired and found a verdict for Boone, for the amount of his account.

Morgan assigns for error. 1st. That the circuit court had no jurisdiction of the case. 2d. That the court erred in its instruction to the jury, and in its refusal to permit his counsel to argue his case, to the jury.

There is no weight in the first objection. As Morgan had obtained a judgment against Boone, for more than five pounds, Boone could not appeal to the county court. "*The matter in controversy*" is certainly above five pounds.

But the second error assigned is fatal to the judgment. The account of Boone was not evidence to prove itself. It was not evidence that Morgan owed it. Boone, as plaintiff below, and as appellant, was bound to introduce proof of his account. If he failed to do it, it would have been the duty of the court to dismiss his appeal. It was not necessary for Morgan to offer any evidence, before Boone had established his claim. The fact, that the account was used or even proved, before the magistrate, would be no evidence, unless it had been also proved, that Morgan had admitted it on the trial, in the country. There was no proof or offer of proof of this kind.

The court must have supposed that the notice of set off, was an admission, either express or tacit, of the account of Boone. This is certainly a mistake. A special plea of set off, without any traverse of the plaintiff's demand, or any other plea denying it, might be construed as admitting it; this would, perhaps, be the legal effect of a single plea of set off, without a

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traverse. But surely a notice of set off can have no such construction or effect. It always accompanies or contains, either actually or by intendment of law, a denial of the plaintiff's demand. A notice of set off is admissible only under the general issue. As there are no pleadings in writing, on trials before magistrates, when a notice of set off is given, it is understood that non-assumpsit is virtually pleaded, if the warrant be on an account, or that the defendant will be allowed to make any other legal defence, if a note be the foundation of the suit.

In this case, could not Morgan have pleaded in form, non-assumpsit, before the justice? He certainly had not waived his right to do so. His notice did not dispense with proof of Boone's account. It meant only that if Boone should prove his account, Morgan would endeavor to obtain a judgment for the excess of his account, over Boone's; and that if Boon should fail on his proof, Morgan would ask a judgment for the whole of his claim.

The facts which the court decided to be conclusive, were not even *prima facie* evidence of Boone's account. Morgan is surely not bound to submit to the erroneous instructions of the judge. He is not concluded by the opinion of the judge, as the judge seemed to think, merely because he had consented, that he should decide the question. If the decision be erroneous, he may have it reversed. It is manifestly erroneous, and therefore must be reversed.

The case is remanded, with instructions to set aside the verdict, and order a new trial.

Hanson, for plaintiff; *Simpson*, for defendant.

Elledge vs. Wilson.

APPEAL.

Error to the Estill Circuit; GEORGE SHANNON, Judge. Case 156.

Magistrate's jurisdiction. Statute. Commonwealth's Bank notes. Account.

Judge ROBERTSON delivered the opinion of the Court. June 18.

WILSON having obtained a judgment against Elledge, before a magistrate, for $24 62 1-2 In 1826, justices of the

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ELLIDGE vs. WILSON.

cents, the latter appealed to the circuit court, where, on the verdict of a jury against him, a judgment was rendered in favor of Wilson, for $24 62 1-2 cents, in notes of the Bank of the Commonwealth, it having been proved that the contract was for such paper.

The only question presented by the record, for our decision, is, whether the magistrate had jurisdiction?

peace had no jurisdiction over accounts in com'ths. paper, exceeding five pound. The act of 1824, Session acts, p. 397, does not apply to accounts.

The act of 1824, giving jurisdiction to magistrates, over contracts in writing, for Commonwealth's paper, not exceeding $50 in amount, does not apply to an account.

Where justice of the peace renders judgment for a sum greater than falls within the appellate cognizance of county court, and over which he had no jurisdiction, the party injured must apply for correction to the circuit court.

In 1826, a magistrate had no jurisdiction over a sum in paper, larger than five pounds, unless it was due by note or other written obligation. If, therefore, the $24 62 1-2 cents had been of less value than five pounds, (and whether it was or not, we do not judicially know,) and it were conceded that the justice might have rendered judgment for its value in specie, as he has not done so, but given judgment for a sum beyond his jurisdiction, his judgment was invalid for want of legal authority.

If the magistrate could take cognizance of the case, the circuit court had no jurisdiction, because, if the amount had been under five pounds, the appeal should have been to the county court. If the circuit court had jurisdiction, therefore, the magistrate had not, so that in any view of the case, the judgment is erroneous.

But if the magistrate had jurisdiction, and, therefore, the appeal ought to have been to the county court, then it would have been the duty of the circuit court, to dismiss the appeal and remit the appellee to his judgment, before the justice. It is, consequently, necessary to decide directly, whether the magistrate had jurisdiction. As we have already intimated, he had not. He could not give judgment for more than five pounds, unless the demand had been due by note or account for money. And as he had rendered judgment for more than five pounds, Elledge could correct his error by appeal to the circuit court alone, which ought to have decided in his favor, for want of jurisdiction by the justice.

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Judgment reversed, and the cause remanded, with instructions to set aside the verdict, and render a judgment according to this opinion. CONDREN vs. GARDNER.

Breck, for plaintiff; *Allan*, for defendant.

Condren vs. Gardner.

SLANDER.

Error to the Calloway Circuit; B. SHACKLEFORD, Judge. Case 157.

Slander. Declaration. Faulty Count. General Verdict. Statute.

June 18.

Judge ROBERTSON delivered the opinion of the Court.

THIS was an action of slander, by Condren and wife, against Gardner. The declaration contained five counts, the last of which is defective, because it recites words which are not actionable.

By 43d sec. of the act regulating civil proceedings, 1 Dig. 255, general verdict upon several counts good, tho' some of the counts defective.

The plaintiffs succeeded in the first trial, on the general issue. The jury found a general verdict for $60 in damages. On motion, the court arrested the verdict for the defectiveness of the fifth count; to which the plaintiffs excepted.

On the second trial the verdict was for the defendant, and the court rendered judgment upon it.

To reverse this judgment and the opinion of the court, on the motion for arrest, this writ of error is prosecuted.

There can be no doubt the verdict was good, and that therefore, the court erred in setting it aside.

In Chitty and Tidd, and other books on pleading and practice, the doctrine is laid down explicitly, and without any discrepancy, that a general verdict on several counts, any one of which is bad, cannot be sustained. And this is perfectly consistent with the philosophy of pleading, and results from the plainest principle. But it is overruled by a statute of this state. By the 43d section of the act regulating civil proceedings, it is provided, that "*where there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good*, but the defendant may apply to the court to instruct the jury to disregard such faulty count;" 1 Dig. 255.

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GILL vs. WARREN'S AD'MR.

Wherefore, the judgment is reversed, the last verdict set aside, and the cause remanded, for a judgment to be entered in favor of the plaintiffs, on the verdict in their favor.

Denny, for the appellant.

ASSUMPSIT.

Gill vs. Warren's Administrator.

Case 158.

Error to the Scott circuit; J. BLEDSOE, Judge.

New trial. Affidavit.

June 18.

Judge ROBERTSON, delivered the opinion of the Court.

If a party, knowing a witness to be absent, voluntarily risks a trial, no new trial can be granted, on account of alleged surprise, arising from the absence of such witness, no matter how important the facts which it may be *positively* averred such witness would have proved. Not necessary that the general issue, and *similter*, should be spread upon the record. Note that they were filed sufficient.

THIS is an action of assumpsit by Gill vs. Warren's administrator, for money, alleged to have been received several years ago by Warren to the use of Gill.

On the general issue, the jury found a verdict for the defendant. Gill moved for a new trial, on two grounds. 1st. That the verdict was contrary to evidence. 2d. That a witness summoned by the plaintiff, did not attend the trial, whereby Gill was surprised.

The court overruled the motion, and entered judgment for the defendant, on the verdict.

Whatever may be the weight of probabilities on either side, the verdict must stand. The facts justified a finding for the defendant.

The affidavit of the surprise, is certainly insufficient. It discloses the fact, that the absent witness was called before the jury, was sworn, and that the plaintiff ventured to go into the trial, on the hazard of his presenting himself in due time. The affidavit is sworn to by the counsel only, and does not shew the materiality of the witness; it does not disclose the facts which he would prove. It does not affirm that he would prove any thing, it only suggests as the belief of the counsel, that his testimony would be important; hence it contains no semblance, of a sufficient cause for a new trial. The affidavit would have been insufficient, even if it had stated *positively*, that material facts could

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have been proved by the delinquent witness. For if a party, knowing that his witness is absent, will voluntarily risk a trial, the absence of the witness can furnish no ground for a new trial.

It is urged, that there ought to have been a new trial, because the jury was sworn to try the issue, and there is no plea or joinder in the record.

The record states, that the plea of non-assumpsit was filed and joined, and the jury sworn to try this issue. In such a case, it seems to us, that neither law nor reason, would exact more. Why is it necessary, that this court should see the plea? Surely not to decide whether it be good in form or substance. It was not objected to. It could not be impertinent, nor insufficient, nor could the issue upon it, be immaterial.

In many cases, perhaps, in most that occur, it would be necessary, that the pleadings should be written and filed, and in such cases, an entry on the order book, that certain pleas were filed, or certain issues made up, would not supply the absence of the pleadings themselves. But there can be no reason for requiring a plea of non-assumpsit, to be spread on the record. In practice, it is not always done. It would, however, certainly be better, if it were always done. If the record shew, that an issue on the plea of non-assumpsit was tried, this court will not reverse the judgment, because the plea is not transmitted here.

The judgment is affirmed.

Monroe, for plaintiff; *Dana*, for defendant.

Passmore's Heirs vs. Moore.

CHANCERY.

Error to the Mercer Circuit; WILLIAM L. KELLY, Judge.

Case 159.

Specific performance. Constructive Notice. Printer's certificate. Infants.

Judge ROBERTSON delivered the opinion of the Court.

June 18.

THOMAS P. MOORE filed his bill in chancery, against the heirs of Augustin Passmore, for a specific execution of a contract, in writing, said to have been executed by the said Augustin, in his life-

Covenant that deed shall be made when the con-

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PASSMORE'S HEIRS vs. MOORE.

time, to William Robertson, for the conveyance of a tract of land. He alleged, that the bond for a title had been assigned to him, and that he had "*complied with the conditions of the said bond, on his part.*"

sideration money is paid. Payment a condition precedent. Certificate of printer, that notice against absent def'ts. had been published "nine weeks," without date of beginning or end, insufficient. Error to pronounce a decree at appearance term. If decree against infants, time must be given after full age, to question decree.

The bond contains a condition, that the deed shall be made, whenever William Robertson shall pay $999 for the land, for which sum he had executed his note.

Some of the heirs being infants, their guardian *ad litem*, required proof in his answer, of all the material allegations of the bill.

The *subpœna*, which was served on some of the other heirs, was made returnable to the term, at which the decree was rendered.

At the July term, 1823, there was an order to advertise against some of the heirs, who were non-residents. The succeeding term was in October. The printer certified on the 12th of November, that the order had been published nine weeks, without stating when the publication was commenced or ended.

In this crude state of preparation, the court decreed a specific execution, and did not reserve to the infants, time after they should become 21 years old, to contest the decree.

There are several errors in this decree, for any one of which, it should be reversed.

1st. There is no proof that the consideration had been paid. The payment of it is not even alleged in the bill. The averment, that Moore had complied with the conditions on his part, is irrelevant and immaterial. There were no conditions on his part. Robertson had given his note for the consideration, and the deed could not be demanded, until payment. It is not alleged that Robertson had paid the consideration, or that Moore had done it for him. The bill, therefore, is defective. And if it had contained equity, there is not a particle of proof, to uphold it. The answer of the infants requires proof.

2d. It was certainly erroneous to pronounce a decree at the appearance term. The act of Assembly is explicit on this point.

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3d. There is no sufficient evidence of constructive notice, to the non-resident defendants. The certificate of the printer does not show expressly, nor by necessary or even reasonable construction, that the order of publication, had been inserted in his paper, two successive calendar months, preceding the October term, to which it was returnable. This is a fatal defect.

4th. The court ought to have allowed time, in its decree, for the infant defendants to contest it, after they shall have attained 21 years of age. Shield's heirs vs. Bryant, 3 Bibb, 525; Pope, &c. vs. Lamaster, &c. 5 Litt. 76.

Wherefore, the decree is reversed, and the cause remanded, for further proceedings, consistent with this opinion.

Haggin, for plaintiffs; *Daviess*, for defendant.

Emily vs. Smith.

TRESPASS.

Error to the Montgomery Circuit; SILAS W. ROBBINS, Judge. Case 160.

Manumission. Guardianship.

Judge UNDERWOOD delivered the opinion of the Court. June 18.

THE deed under which the plaintiff in error claims her freedom, completely emancipated her, from the time of its execution, with the reservation to retain the guardianship of Emily, then an infant, until she should arrive at age. This reservation was personal to Enoch Smith. The defendant had no right to retain the plaintiff, against her will, after the death of said Enoch. The evidence conduced to show an illegal detention. The court erred in their instructions to the jury, to find, as in case of a non-suit.

Deed of manumission, the guardianship of the infant, reserved to the grantor. The right is personal and ends with his death.

The judgment must, therefore, be reversed with costs, and a new trial awarded.

Monroe, for plaintiff; *Triplett*, for defendant.

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CHANCERY.

Skinner vs. Skinner, &c.

Case 161. Appeal from the Clarke circuit; GEORGE SHANNON, Judge.

Administrators. Settlement. County court. Lapse of time.

June 18. Judge UNDERWOOD delivered the opinion of the Court.

THIS record, although consisting of more than 300 pages, presents nothing new or difficult. The complainant's claim to the land, is not supported. It does not appear that his ancestor was entitled to any particular tract. The bond he held on the Beals, shows that he was not. All that the complainant or his ancestor could claim, would be damages from the Beals; and if the defendant, Cornelius, by compromise with them, has taken a lesser, or obtained a greater value, by taking property, he is only responsible for the exact amount of damages which the Beals were liable to pay. Had it been clearly shown, that the Beals procured the land and conveyed it, or caused it to be conveyed in satisfaction of their covenant, it might have altered the case, but for the purchase made by the defendant, Cornelius, of the complainant's interest in the covenant.

Bill to question the acts of adm'rs. or ex'rs. after settlement with county court, acquiesced in for 20 or 30 years, by guardian and compl'nt. and after complainant of age, 12 or 13 years, not to be tolerated.

The attempt to unsettle the accounts and settlements of the defendant, Cornelius, as administrator on the estate of his and the complainant's father, and to set aside the sales of negroes, although purchased by the administrator in part, when these settlements and sales were made, under the sanction of the county court, where administration was granted, in Virginia; and when they have been acquiesced in, by the distributees and their guardians, between twenty and thirty years before the bringing of this suit; and when the complainant was of full age, twelve or thirteen years before the institution of his suit, and lived with, and near the defendant, Cornelius, seven or eight years of that time, cannot be tolerated, without the most satisfactory evidence of fraud. There is no such evidence. Upon the whole case, we think there is no cause for reversing the decree.

The decree is affirmed with costs.

Hanson, for appellant; *Allan*, for appellees.

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Bain vs. Harrison.

CHANCERY.

Error to the Fayette Circuit; THOMAS M. HICKEY, Judge. Case 162.

Chancery jurisdiction. Defence at law. Injunction.

Judge ROBERTSON delivered the opinion of the Court. June 19.

HARRISON obtained a judgment on the following note, for the nominal amount in specie:

"269 5 1-2. LEXINGTON, MAY 8, 1821.

"Ninety days after date, we jointly and severally promise to pay to Robert C. Harrison, or order, two hundred and sixty-nine dollars 5 1-2 cents, for value received; witness our hands and seals, the date above. *Payment in state paper.*

"PATTERSON BAIN, (Seal.)
"E. YEISER, (Seal.)
"THOS. BODLEY, (Seal.)"

If a def't. permit judgment to be entered against him, for the nominal amount of a note, which, upon its face, is dischargeable in paper, chancellor will not grant relief, upon allegation that the judgment was for too much. His defence at law was complete.

A bill in chancery was filed to enjoin the judgment, on the ground that it was for too much, and that Harrison ought to be compelled to accept bank paper, in a discharge of it, which he refused to do. He answered the bill, denying its allegations; and on bill and answer, the injunction was dissolved, and the bill dismissed. To reverse this decree, this writ of error is prosecuted.

The decree is right. The injunction was improvidently granted. The bill contained no equity. The note, *on its face*, was payable in paper, and in nothing else. Harrison, therefore, had a right to recover judgment for no more than the value of the paper, in specie. If the court gave him judgment for more, the error could have been corrected by this court, on an appeal or writ of error. But the chancellor surely, cannot correct or reverse the judgment.

Bain's remedy was at law. By defending the suit, he could have prevented a judgment for more than the value of the bank paper. He had, therefore, no pretext for appealing to the chancellor. Besides, the allegations of his bill were denied, and there was no proof.

Wherefore, the decree is affirmed.

Haggin and *Loughborough*, for plaintiff; *Richardson*, for defendant.

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CHANCERY.

Williams vs. Potts, &c.

Case 163.

Error to the Nicholas Circuit; H. O. BROWN, Judge.

Specific performance. Recision. Representations. Title. Costs. Damages. Time.

June 19.

Judge ROBERTSON delivered the opinion of the Court.

Covenant to make a deed to and, with special warranty, covenantor must shew a complete legal title. Bill for conveyance, if title in vendor complete, erroneous to dismiss, without decreeing title. If title incomplete, contract should be rescinded, or, when no fraud, time given to complete the title When complainant has a right to go into chancery erroneous to decree against him, costs and damages.

WILLIAMS purchased a tract of land from Yater, for which Yater bound himself to make a special warranty deed, as soon as the whole consideration should be paid. Williams having paid all the price except the last instalment, Potts, the assignee of the note therefor, obtained a judgment against him. To enjoin this judgment, the bill in this case was filed. It charges, among other things, a payment of $50, for which no credit was allowed; that Yater represented that he had a perfect legal title to the land, derived from the patentee, Abercrombie. But that the title had never passed from Abercrombie to Fowler, under whom Yater held, and that Yater had removed from the state. There is a prayer for a specific execution, if the legal title be in Yater; otherwise, for a recision of the contract.

Yater denies fraud; denies that Williams is entitled to any credit; insists that his title is complete, and offers a deed. He does not, however, deny that he stated that he had derived, and held all the title *of the* patentee; and in exhibiting the evidences of his deduction of title, he shows that Abercrombie, had only conveyed to Fowler, for specified purposes, and held a mortgage on the land, to secure their fulfilment.

The circuit court dissolved the injunction, and dismissed the bill, and made no decree as to the title.

This decree is erroneous. 1st. The title is not complete. The patentee has not conveyed to Fowler, the absolute fee simple. Abercrombie, the patentee, conveyed to Fowler, 14,000 acres, and Fowler then mortgaged the land to Abercrombie, as a security for conveyances, by Fowler, to such persons as had previously bought from Abercrombie; and it does not appear whether the deed from Fowler, violates this condition or not. And, although Yater was only bound to convey, by deed of special warranty; nevertheless, he cannot perform this engagement, unless he has a com-

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plete legal title. He is bound to make a legal title to Williams. This he cannot do, unless he hold a legal title. As, therefore, he was unable to comply with his covenant, and had left the state, Williams had a right, on this ground, to an injunction. Consequently, the injunction ought not to have been dissolved, nor a decree rendered for costs and damages. 2d. As Yater was called on to exhibit his title, and the court asked to decree a conveyance, if the title were good, it was erroneous to dismiss the bill, without making a decree for a title. 3d. As the title is not shown to be complete, the court ought either to have perpetuated the injunction and rescinded the contract, or to have given Yater a reasonable time, to obtain or exhibit the title. Williams is not bound to accept a deed from Yater, unless it will convey a complete legal title. It is not material whether Yater's title be the best or not, but it must be complete in itself. A covenant for a special warranty title, is nothing less than a covenant for a legal title. A covenant for title, without any warranty, binds the covenantor to make a good legal title. The only difference between a general and special warranty, is, that the one binds the covenantor, and the other does not, to indemnify the covenantee, for an eviction by a stranger. Each is equally broken, if the warrantor had no title, regularly derived from the commonwealth.

If Williams desired to render his title unquestionable, he ought to have made Fowler and Abercrombie parties.

As in this case, it is probable that there was no fraud, and that Yater believed that his title was perfect; and as Williams has enjoyed the uninterrupted use and possession of the land, and it would be difficult, by a recision, to place the parties in "*statu quo*," it will be proper, to allow Yater time to obtain the legal title, in an unquestionable shape. This will be justice, and Williams being complainant, can ask nothing more than justice.

Wherefore, the decree of the circuit court is reversed, and the cause remanded, with instructions to allow Yater a reasonable time for obtaining the legal title, if he has not such title, or if he has, for shewing

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KEMPER, &c. vs. PRYOR, &c.

that fact, by making the proper parties for that purpose, to-wit: Fowler and Abercrombie; and if he shall procure the title, or show that he already has acquired it, to decree a conveyance of it to Williams, and dismiss his bill, and dissolve his injunction, without costs or damages; but to rescind the contract on equitable terms, if Yater shall refuse, or be unable to procure or to prove a complete title from the patentee.

Depew, for plaintiff; *C. S. Bibb* for defendant.

COVENANT.

Case 164.

Kemper et als. vs. Pryor et als.

Error to the Oldham Circuit; HENRY DAVIDGE, Judge.

Non est factum. Evidence.

June 19.

Judge ROBERTSON, delivered the opinion of the Court.

Covenant, plea, *non est factum*, two subscribing witnesses: the signature of one illegible, and himself not known, the other witness had removed, and tho' sought, not to be found. Ruled, that it was competent to introduce the person who had signed the names of the def'ts. to prove that he had done so at their request.

ON an issue of *non est factum*, in an action of covenant by the plaintiffs against the defendants in error, the plaintiffs proved, that one of the subscribing witnesses to the covenant, (there being two,) was unknown, and it appeared by inspection, that his attestation was illegible. They also proved, that before the date of the writ, the other witness to the writing, had removed from the State to parts unknown; and that they had not only made diligent enquiry, but had sought for him in and out of the State, and had been unable to obtain any information as to his residence, or to find any person who was acquainted with his hand writing. They then offered to prove by other testimony, that the defendants had authorized an agent to sign the covenant for them, who, in pursuance of that authority, had subscribed their names to it. The court refused to admit this evidence: and whether, in this, it was right, is the only question for our consideration.

The opinion of the circuit Judge, is clearly erroneous. Before evidence of a secondary or inferior grade is admissible, the non-production of that of a higher degree of credit, must be satisfactorily accounted for. The reason is, that withholding the best evidence of which the case is susceptible, creates a strong presumption against the credibility of the fact, attempted to be proved.

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But whenever the fact in issue, is not susceptible of better evidence than that offered, or if it be, a sufficient apology can be made for not producing it, the reason of the rule entirely fails; and therefore, the rule itself does not apply. 1 Starkie, 388–90.

Hence, if a subscribing witness be ascertained to be dead, or for any other cause beyond the power of the court, proof of his hand writing is admissible; so if by interest, or otherwise, he be incompetent. Ib. 337.

These doctrines are understood, and admitted by all, who have any pretensions to learning in the science of the law.

If the death or absence, or incompetence of the subscribing witness will let in proof of his hand writing, why is not the rejected evidence in this case competent, after it is ascertained that it is impossible either to produce the witness or proof of his hand writing?

There can be no doubt that it is admissible; and this is demonstrated not only by the analogy and reason of the law, but by express authority. See 3 Binney, 192; 1 Hayw. 238. These are not authoritative decisions. But they are the opinions of intelligent courts on the common law of evidence; they are entitled to respect, and their influence should be decisive, as it is corroborated by reason without being perplexed by any opposing "dicta."

If the signature of the witness be erased, or be not legible, his hand writing cannot be proved; and therefore, the next evidence in degree, may be introduced. 1 Starkie, 337. So if the witness cannot be found, after diligent search, his hand writing may be proved. Cook et als. vs. Woodrow; 5 Cranch, 13.

We would be at a loss to imagine stronger reasons for introducing inferior testimony, than those furnished in this case. Indeed it is not inferior in credibility or effect, but only in its legal grade.

The plaintiffs had done all that they could do; the law will require no more. Their testimony was legal, and ought to have been admitted.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

C. S. Bibb, for plaintiffs.

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MOTION.

Thompson vs. Ross.

Case 165.

Error to the Fleming Circuit; W. P. ROPER, Judge.

Sheriff. Execution. Return. Statute.

June 19.

Judge UNDERWOOD delivered the opinion of the Court.

The 4th sec. of the act of 1811, 2 Dig. 1144, excuses sheriffs for failing to return execution for 'good cause.' When sheriff has acted in good faith, has complied with the requisites of the law in all other respects, and has actually enclosed an execution, emanating from another county, in a letter, for the purpose of having it returned in time, has put it in the post office, directed to the proper place, but has addressed it to *Johnston Ross* instead of *Joseph Ross*, by accidental mistake. Adjudged that he is not subject to the penalty of the law.

By the 4th section of an act passed in 1811, 2 Dig. 1144, it is provided in substance, that "no sheriff shall be compelled or required to go out of his county, to render his return of any writ of execution to him directed, provided he shall enclose such execution, with his return thereon, (keeping a copy thereof) directed to the *plaintiff* or *his attorney*, and send the same by mail to the county wherein the court is holden, whence such execution issued." If there be no post office in the county, then the sheriff is to resort to "*other safe conveyance.*" An execution for $265 36, with interest from the 3rd of August, 1824, in favor of the defendant in error (*Joseph* Ross,) against W. J. Balston, which issued from the clerk's office of the Fleming circuit court, directed to the sheriff of Nicholas county, returnable on the Saturday succeeding the first Monday in September, 1826, came to the hands of Wm. H. Thompson, a deputy for the plaintiff in error, who was sheriff, on the 20th July, 1826.

In proper time the deputy enclosed the execution, with his return thereon "no property found," keeping a copy thereof, in a letter directed to "*Johnston* Ross, or his attorney, Flemingsburg, Kentucky," and deposited the letter with its contents in the post office in "*Carlisle, Ky.*" Wm. P. Fleming, the attorney at law for Joseph Ross, seeing an advertizement of the letter, as not having been taken out of the post office at Flemingsburg, advised his client that it probably contained the execution, as it had the post mark of Carlisle. On the 5th of February, 1827, *Joseph* Ross the plaintiff below and defendant here, took out the letter, and it did contain his execution placed in Thompson's hands, with his return upon it. In a few days thereafter, said Ross gave the sheriff Thompson notice, that he would move against him at the ensuing March term of the Fleming circuit court, on the fifth day thereof, for the principal and interest of the execution, and for the damages allowed thereon by law. The motion to be predica-

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ted on the failure of the deputy to return the execution.

The court gave Ross judgment for $318 38, the amount of principal, interest and costs, specified on the face of the execution, and 30 per cent. damages thereon; in all $413 89. To reverse this judgment, Thompson has prosecuted this writ of error. In addition to the facts already stated, it was proved on the trial, that Joseph Ross, had a brother named *Johnston*, who had removed to the state of Ohio, a few years before the execution of Joseph was placed in the hands of the deputy. Wm. H. Thompson who was admitted as a witness, the sheriff having executed a release to him, stated that he had received another execution against Ralston, which was in favor of *Johnston* Ross; that the execution in the name of Johnston Ross, issued from the clerk's office of the Nicholas circuit, and that he was familiar with the name of *Johnston* Ross, having done business in his name. He also stated that he knew the defendant personally, and believed him to be *Johnston* Ross, instead of *Joseph*, not knowing that there was a Johnston Ross, who had moved to the State of Ohio; that he directed the letter enclosing the execution, and put it in the post office; that it was designed and intended for the defendant in error; and that he did not know of the mistake, until the letter was shewn him in open court by Mr. Fleming. The witness admitted the address to be in his hand writing. He also stated, that the defendant in error, on the 1st Monday in August, told him not to push the execution, as he was trying to settle, and shewed him a mortgage on Ralston's property; but said if he did not communicate with the witness in a week, then the witness was to go on with the execution. Witness said he went frequently to Ralston's residence in search of property, but could find none; and that he made nothing on the execution in the name of Johnston Ross, or the execution in Joseph Ross's name. Ralston was a nephew of the Ross's, and evidence was given conducing to prove, that he had secreted his property, one slave and a horse, so that the sheriff could not find it. Carlisle, the seat of justice for Nicholas county, is about twenty miles from Flemingsburg, the seat of justice for Fleming county.

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THOMPSON vs. ROSS.

Upon the foregoing facts, the question arises, whether the sheriff has been guilty of such a violation of duty under the law, as will sanction the judgment which has been rendered against him. If the law has been *substantially* complied with, or if the sheriff can assign "*a good cause*," in the language of the statute, or in common parlance, give a *good excuse* for failing to comply, then he ought not to be held responsible.

What constitutes a good cause or good excuse for failing to return an execution? In the case of Waring vs. Thomas, 1 Litt. 253, this court decided that the mislaying an execution and inability to find it, amounted to *good cause* or *good excuse* for not returning it. In that case the nature of the casualty or the circumstances under which the execution was lost, are not detailed. Whether the loss proceeded from negligence or not, is left to conjecture. Disease of body or mental derangement, may constitute a good excuse in many cases for not returning executions. The principle applicable to the subject, as arising from the statute of 1811, is, that sheriffs shall not be liable for a failure to return process in time, where such failure proceeds from a cause, that could not be effectually guarded against by a diligent attention to business. The law excuses a sheriff for "*good cause*," but it has not defined what is meant by that expression; and we are left to ascertain the intent of the legislature by a consideration of the objects of the act of 1811, authorizing motions against sheriffs and giving 30 per cent. damages, for failing to return executions.

We cannot imagine that the legislature by that act, intended to do more than to prevent the wilful or negligent defalcations of sheriffs. It never was designed to make them warrant against those frailties and accidents which are incident, frequently, to the prudent and careful man. If such had been the intention of the legislature, no provision would have been made for excusing for *good cause*. Under the facts of this case, we are of opinion, that the mistake in using the name of *Johnston* for *Joseph*, has been accounted for in such manner, as to shew that it might reasonably happen with a prudent, diligent man. The name of *Johnston* was familiar to the deputy who had the execution; he

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believed he knew the man personally; he had done business in that name; he could find no property of the defandant in the execution, and it was unnecessary to read it, until he did find property. He had conversed with the plaintiff in the execution, believing his christian name was *Johnston*. He had no object in withholding the execution, so as to use money which he had collected. No selfish motive could have existed for not returning it. The attempt to return it, was made, and that in good faith. The mistake proceeded from a confidence, that the direction of the letter was right. To make the sheriff pay the debt and damages under such circumstances, would we think be unreasonable. It would be a practical infliction of a penalty without a crime. Moreover, we are of opinion, that the law was *substantially* complied with.

The direction of the letter to "*Johnston* Ross or his attorney, "post marked "Carlisle," would have been deposited, on its arrival in Flemingsburg, in the letter box, where *Joseph* Ross's letters would be put. If the latter inquired for letters, the presumption is strong, that he would have learnt that such a letter was there; and the conclusion from the manner of its direction, and the place from whence it came, would have been forcible that he was the person for whom it was intended; particularly as he knew that his brother Johnston had been a citizen and resident of the State of Ohio, for years; and as the post master ultimately let him have it, the inference is, that he would have got it at any time by applying for it. Suppose in writing the direction on the letter, instead of making the mistake in the christian name, a mistake had been made in the sir name by spelling it *Russ*, instead of *Ross*, should that have rendered the sheriff liable? Or suppose it had been spelt *Ros*, leaving out one *s*, should the sheriff be liable? Such errors or mistakes, where it is clear that the sheriff was endavoring to do his duty, and when it is shewn that the other party has not been injured, ought not to render him liable; and as such mistakes or inadvertences may happen with the careful and prudent, we think they ought to be received as excuses in cases circumstanced like the present.

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RENFRO vs. TRENT.

Wherefore, the judgment is reversed, and cause remanded for judgment to be rendered for the plaintiff in error, who must recover his costs in this court.

Crittenden, for plaintiff; *Haggin* and *Loughborough* for defendant.

TROVER.

Case 166.

Renfro vs. Trent.

ERROR to the Meade Circuit; HENRY PIRTLE, Judge.

County courts. Administration. Void. Voidable. Jurisdiction. Statute.

June 19.

Judge UNDERWOOD delivered the opinion of the Court.

County courts have general jurisdiction, over administrators of estates Administration granted to one not next of kin, voidable. County court has a right to avoid it, and may remove one adm'r. and appoint another.

AT the February term, of the Meade county court, in the year 1827, Trent obtained letters of administration, on the estate of Eliza Renfro, deceased. At the ensuing March term, of said court, the order appointing Trent administrator, was rescinded, and administration granted to Jane Renfro, the plaintiff in error, and mother of the deceased. After this, Trent as administrator, instituted an action of trover, against said Jane, to recover for the conversion of a slave, which belonged to the deceased. Issue was taken on the plea, of not guilty, with leave to give the special matter in evidence. The plaintiff in the action, claimed under the letters of administration, granted to him, while the defendant claimed under those granted to her; and the whole case, most clearly turned upon the legal question, whether the administration granted to Trent, had been superseded by the rescinding order at March, and the appointment of the defendant.

County courts, by the statute, are vested with "jurisdiction of all causes, respecting wills, letters of administration, &c." See 1 Dig. 356. This power, vested in the county courts of this state, is substituted in place of the power, which the ordinary possessed in England, over the administration upon intestates estates, and we cannot limit it, within less bounds, than were prescribed by the laws of England, for Ordinances. According to the law on this subject, as laid down by Toller, administrations are *void* or *voidable*. See section 8,

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119. It is there laid down expressly, that "if administration be granted to a party, not next of kin," it is voidable. That is this case, precisely. How is it to be avoided? It cannot be done in this country, unless, by the sentence of the county court. As jurisdiction is granted to the county courts over *administrations* generally, changing administrations, is a necessary incidental power, to effectuate the objects of the law in many cases. For instance, if the administrator should become *non compos mentis*, or if he should be notoriously mismanaging the assets, there ought to be, and in our opinion, there is power in the county court, to interpose, remove the incumbent, and appoint another. Whether county courts can repeal an order, granting a certificate of probate, to an executor, is a question of a very different character. It was hinted at, in the case of Gordon, &c. vs. Wood, Administrator, 4 Bibb, 476; but not decided, and will not now be decided. The executor derives his authority from the will, the administrator derives his from the law. The law in some cases may take back that which it grants, while it could not disturb that granted by another.

It is stated in the bill of exceptions, that the plaintiff in the circuit court, and defendant here, proved "that the negro was the property of the decedent." Under that proof, connected with the order of the county court, repealing his letter of administration, the "law of the case was for the defendant," and we cannot conceive, how it could be otherwise; but the court refused to tell the jury so, on the application of the defendant, asking for that instruction.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded, for a new trial. The plaintiff in error, must recover her costs of the defendant, to be levied of his estate, because it appears to us, that he is not administrator of Eliza Renfro, although he sues in that character.

Darby, for plaintiff; *Semple*, for defendant.

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Trover, &c.

Case 167.

Fightmaster, &c. vs. Beasley.

Error to the Henry Circuit; Henry Davidge, Judge.

Practice. Evidence. Joinder in action.

June 20.

Judge Underwood delivered the opinion of the court.

If cause of action is complete, or has its inception before marriage, husband & wife may unite. If it accrue after marriage, husband must sue alone, if it relate to personalty. Rules of practice should promote, not defeat justice; pl'tff. not to be nonsuited for an oversight. Court should suffer a question to be asked and answered, even after non suit ordered, and exception, if tending to sustain pl'tff's action.

This was an action of trover and conversion, for a slave. The plaintiffs in error, who were plaintiffs below, gave evidence of their title, which having been concluded, the court instructed the jury to find as in case of a nonsuit, and the jury found accordingly. The plaintiffs set out the evidence and excepted. After the court gave the instruction, and the bill of exceptions were prepared, the plaintiffs asked permission of the court, to put one question to a witness, who had been examined; and that was, whether Fightmaster had not been married after demand made of the defendant, and his refusal to give up the slave. The court would not permit the question to be asked, and to that refusal an exception is filed. The instruction given, and the refusal to admit the proof, are the points assigned for error.

Without setting forth the evidence minutely, it is sufficient to say that the length of possession, and the manner in which it was held, as proved, were *prima facie*, evidence of the right of the plaintiffs to the slave in controversy; notwithstanding, the slave may not have passed to them, under the devise in their favor, contained in the will of their grandfather, William Rouzee. In what right the defendant claimed, did not appear; as a mere wrong doer, we are of opinion his claim could not be supported against that shown by the plaintiffs; and, therefore, the court erred in giving the instruction to find as in case of a nonsuit, unless it was given for some other cause, than want of evidence, to support the declaration. It is supposed by counsel, that the circuit court may have acted upon the ground, that there was no proof of the time, when the marriage between Fightmaster and Harriet Wooldridge, took place; and that it did not appear, for want of such proof, that they were properly made joint plaintiffs, with others. We think the inference is very strong, that the marriage took place after the defendant refused to give up or return the slave, at which time the evidence of conversion is complete. If the trover of

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the wife's property takes place before marriage, and conversion during it, husband and wife may unite in the action; much more may they do so, if the cause of action is complete, before marriage. "But when the cause of action has its inception, as well as completion, after the marriage, the husband alone must sue, the legal interest in personalty, being vested, by the marriage, in him." 1 Chitty, 62.

But if there were doubts on this point, owing to the unsatisfactory nature of the evidence, we think the court should have permitted the question to be asked and answered, as to the time of Fightmaster's marriage. We do not believe that a sound discretion consists in making rules of practice so rigid, as to defeat instead of promoting the ends of justice. That a court of justice should nonsuit a party for a mere oversight in failing to ask a question, looks too much like tolerating trick and cunning, to meet our approbation, and is inconsistent with that dignity and liberality, and that constant pursuit of justice which ought to characterize the proceedings of our judicial tribunals. We would not, however, for this cause alone, reverse the judgment. The case must be an extreme one, to induce us to reverse because of a rigid practice in the circuit courts.

Judgment reversed and new trial awarded. The plaintiffs must recover their costs.

Monroe, for plaintiff; *Crittenden*, for defendant.

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1 Circuit Court is not limited as to time, in making up or signing bills of exception. *Gordon vs Reynolds,* 57

2 Circuit Court may refuse a continuance after sustaining a demurrer, and an offer made to amend; unless it is clear from the record, that such an amendment was essential to justice. *Hassard vs Smith,* 67

3 Circuit Court has discretion over the pleadings of the parties uncontrollable, unless manifest injustice be done. *Bate vs Lewis's ex'rs.* 315

4 Circuit Court can take no jurisdiction over a recognizance not returnable to the clerk's office by law. *Commonwealth vs Edwards,* 352

5 Circuit Court has a sound discretion in directing and setting aside nonsuits. *Sanders & Williams vs Outten,* 488

6 Circuit Court has discretion in admitting amendments. *Honore vs Colmesnil,* 508

7 Circuit Court has jurisdiction by appeal, on sums too large for the County Court, and on which a justice of the peace has rendered judgment. *Elligs vs Wilson,* 588

8 Circuit Court may give time to a defendant to complete his title, in order to fulfil his contract. *Williams vs Potts,* 596

Clerk.

If the act of a clerk *per se* amount to breach of good behaviour, the court will not inquire into the motive. *Commonwealth vs Chambers,* 120

Commissioners.

Commissioners to wind up Independent Banks substituted for stockholders—the latter not necessary parties to any proceedings to charge said banks. *Dana vs Brown, &c.* 304–5

2 Commissioners have no *lien* upon stock of debtor, to give precedence to other creditors. *Dana vs Brown, &c.* 306

Commissioners in Chancery.

1 Commissioners in Chancery appointed to adjust accounts, regulated by order of court appointing them. *Honore vs Colmesnil,* 508

2 Exceptions to their report will be heard at any time before final decree. *Ibid,* 510

Commissioners' Reports.

1 No rule of law which precludes the court from hearing excep-

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tions to the report of commissioners, or master in Chancery, at any time, or from correcting or rejecting the report in whole or in part, even upon final hearing. *Honore vs Colmesnil, and vice versa*, 510

2 Death of witnesses whereby their testimony would be lost, no reason against setting aside an incorrect report of commissioner. The party should have taken their depositions. *Ibid*, 511

3 If new matter be introduced in a cause, after commissioners have reported, the subject should be again referred, or the court should itself act upon the whole case thus presented. *Ibid*, 512

Conditions Precedent.

1 Conditions precedent must occur or be performed, before a right of action arises. *Pasmore's heirs vs Moore*, 592

2 That deed shall be made when consideration money is paid—condition precedent. *Ibid*, 592

Conditions Performed.

Plea of conditions performed admits all the facts that are well alleged, and assumes the proof of performance. *Harrison vs Park*, 172

Confirmation.

Mortgage made in lucid interval, reciting prior mortgage, executed during lunacy, indicates assent, and operates as a confirmation. *Breckenridges heirs vs Ormsby*, 255

Consignor and Consignee.

Consignee of goods to be sold on commission, undertakes to account for the proceeds, and pay balance to a third person in a suit between such person and consignee, consignee cannot set up an equity between himself and consignor. *Bruce vs Burdett*, 83-4

Constitutional Law.

1 The duty of the judiciary to protect private rights, and private property from any unconstitutional invasion, by legislative enactment, whether it result from accident or design. *Davis vs Ballard*, 566

2 Object of the framers of the Constitution, to secure the enjoyment of life, liberty and property, and the pursuit of happiness. *Ibid*, 567

3 The 12th and 13th sections of the 10th article of the Constitution, indicate the duty to be performed by the functionaries of the government in the protection of the citizen. *Ibid*, 568

4 Quaere. Does not the Constitution, by the use of the disjunctive "or," after "taken," in 12th sec. 20th art. inhibit the taking of A's property, and giving it to B, as well as the application of it to public use, without consent and compensation. *Ibid*, 569

5 Any law which would impair the obligation of a contract, would impair the contract, and equally violate the Constitution of Kentucky, and of the United States. *Ibid*, 571

Contracts by implication of law.

The law will not imply a contract to pay for board Admission by husband, that he was "to pay for his board," authorizes the jury to infer that he had made a contract to that effect; but does not bind him to pay for the board of his wife and servant. The act of Va of 1663, II. Littell's Laws, 583, in force. That act does not require there shall be special agreement, as to the price to be paid for board; but a positive contract to pay. *Royal's adm'rx. and heirs, vs Bryan*, 339

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Contract by parol, for land.

1 Is not "ipso facto" void *Rowland vs Garman, &c.* 76

2 Contract by parol for land may be good between the parties under some circumstances and for some purposes. *Ibid,* 76

3 If one party perform, the other cannot refuse. Party delinquent cannot berelieved in equity. *Ibid,* 76

Costs.

1 Costs should not be decreed vs complainant, who has sustained his injunction in part. *Hoofman vs Marshall,* 65

2 Costs in the Court of Appeals are governed by the act of 1796. *Scroggin's adm'r vs Scroggin,* 363

3 Costs when given, against adm'r or ex'r, in the Court of Appeals. *Ibid,* 364

4 Error to give judgment for costs against executor or administrator sueing *en autre droit. Caperton. adm'r of Kurr vs Callison, &c* 399

5 Writ of error revived against executors, *costs* decreed against them, which had accrued prior to the death of testator, to be levied *de bonis testatoris Brown vs McKee's representative,* 477

6 Costs should not be decreed against a complainant who had grounds of equity. *Williams vs Potts.* 596

Counsellor at Law.

See Attorney at Law, 3

County Court.

1 County Court cannot try the right to dower, but may assign it when the right is admitted. *Williams vs Williams,* 106

2 County Court cannot bind orphan or poor child, under the statute of 1793 II. Dig. 1040, until the parent, next friend, or person having the care of such orphan or child, shall have been summoned and makes default, or fails to shew cause against it. The record must shew, that the statute has been pursued *Coffee. &c. vs Watt,* 306-7

3 Order of County Court directing estate of intestate to be delivered to the securities of administrators, who have applied for counter-security or other indemnity, does not constitute such securities, administrators. *Combs vs Church, &c* 331

4 County Court may remove one administrator and appoint another. *Renfro vs Trent,* 604

5 County Courts have general jurisdiction over administrators of estates; administration granted to one not next of kin voidable. *Ibid,* 604

6 County Court has a right to avoid it, and may remove one administrator and appoint another. *Ibid,* 604

Court de facto.

Under the constitution of Kentucky, no court of mere fact, without right can exist *Hildreth's heirs vs McIntyre's devisees,* 207

Court of Appeals.

1 There can be but one Court of Appeals *Hildreth's heirs vs McIntyre's devisee,* 207

2 Court of Appeals will reverse discretionary proceedings of inferior courts, to attain justice. *Bate vs Lewis,* 315

3 Court of Appeals can take no jurisdiction over a recognizance originally void. *Commonwealth vs Edwards,* 352-3

4 Court of Appeals cannot correct its own judgments of a former

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term: but it may rectify clerical mistakes. *Scroggin, adm'r vs Scroggin*, 365

5 Appearance in Court of Appeals, waives the necessity of advertising when cause remanded *Brown vs Humphreys, &c.* 394

6 No one can prosecute an appeal or writ of error, but the party agrieved. *Pugh's heirs vs Bates' heirs*, 406

7 Court of Appeals will not interfere when circuit court has discretion, unless exercised with manifest injustice *Sanders and Williams vs Outten*, 488

8 Court of Appeals should protect persons and property, from the operations of unconstitutional acts of the Legislature. *Davis vs Ballard*, 566

9 Court of Appeals will not tolerate a bill questioning an administrator's settlement with the county court, ten or twelve years after the complainant comes of age. *Skinner vs Skinner*, 594

Courts.

1 Courts will *ex officio* take notice of mutations and fluctuations in language *Vanada's heirs vs Hopkins' adm'r.* 287

2 Court will not *ex officio* order *certiorari*, unless intrinsic evidence of diminution of record. *Violet, &c vs Waters*, 304

3 Courts of original jurisdiction, have no control over orders or judgments, unless during the term at which rendered or entered up. *Commonwealth, &c vs Williams, &c.* 309

4 Courts of limited jurisdiction should see that the plaintiff puts himself within those limits. *Ingraham vs Arnold*, 406

Covenant.

1 Covenant to pay bank notes and to do other things, not within the statute which authorizes the recovery of them in kind. *Stockton vs Scobie*, 6

2 In action of covenant for breach of general waranty, plea, that covenantor had conveyed the land to another by deed, no bar; unless it appear from the plea, that such deed is valid. *King vs McLean*, 33

3 Where independent covenant, either party can maintain an action without performance. *Sharp vs White*, 107

4 Covenant that is void binds nobody; if voidable only, it binds until set aside. *Breckenridge's heirs vs Ormsby*, 240

5 Covenant, to be performed presently: unless time given. *Dougherty's adm'r vs Goggin*, 375

6 Covenant to convey land on the payment of the price, payment made to the sheriff as agent, affects his principal, and binds him to make immediate conveyance without personal notice of payment. *Couchman vs Boyd*, 395

7 In action of covenant to sell for the best price that can be obtained, declaration must aver that covenantor could have sold but did not, or it is insufficient. *Harris vs Ogg*, 410

8 A plea in the language of the covenant, to do or to perform, avering the thing to have been done or performed, is good and equivalent to covenants performed. *Ibid*, 410

9 No averment can enlarge the stipulations of a contract, or create a covenant by implication *Ibid*, 411

10 Covenant cancelled, is no covenant in effect. *Baur vs Evans*, 432

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11 Covenant may be cancelled by parol. *Ibid*, 432

12 Covenant for board is never implied, is strictly construed, and must be clearly proved. *Royal's adm'rx and heirs vs Bryan*, 433

13 Covenant made with fraud is *ex delicto*, whether verbal or written, and the remedy is by "action on the case." *Hancock vs Ship*, 440

14 Covenant for personal services not assignable at law, neither stipulating to pay money nor property. *Henry vs Hughes*, 454

15 If covenant assignable, the declaration defective in not alleging a demand, and an assignment. *Ib'd*, 454

16 Covenant to convey land with special warranty, covenantor must shew a complete legal title. *Williams vs Potts, &c.* 597

Damages.

1 Damages to be assessed in a case of bank notes, according to their value when falling due. *Stockton vs Scobie*, 6

2 Damages laid in an action of debt, are to cover the injury resulting from detention, though in debt upon bond with conditions, the recovery sounds in damages; yet it is compounded of the debt and damages. *Harrison vs Park*, 174-5

3 The value of the land when devise took effect, the measure of damages if the land is lost, and the sum to be compensated, by contribution *McLaughan's devisees vs Kennedy, &c.* 338

4 Covenant to sell for the best price the article engaged to be sold, would have commanded, within a reasonable time after it was in market, is the measure of damages. *Harris vs Ogg*, 412

5 The sum upon which damages are rendered, should be ascertained. Erroneous to leave it to the inquiry and decision of the clerk. Error, to decree damages twice. *Noland vs Richards*, 582

Debt.

1 Distinction between debt, upon bond, and covenant. *Harrison vs Park.* 174

2 Plaintiff has no right to recover more than he claims. *Ibid.* 174

3 In action of debt, the damages laid in the declaration, are generally as compensation, for the retention of the debt. *Ibid.* 175

4 In action of debt on bond, with conditions, the damages assessed by the jury, are substituted for the debt itself, and limit the amount of plaintiff's demand. *Ibid*, 175

5 Debt, upon joint and several obligations, either one or all must be sued *Hobbs and Churchill vs Middleton*, 178

Debtor and Creditor.

Debtor has his election at the time of partial payment, to direct how the credit to be applied; if he do not direct, creditor may make the application. *Hillyer vs Vaughan*, 573

Declaration.

1 Declaration against several upon joint undertakings, proof, separate liabilities, plaintiff cannot recover. *Erwin vs Devine*, 204-6

2 If a declaration describe a judgment as it is in appeal bond, sued on, it is sufficient. *Evans vs Hardwick's heirs*, 437

Decree.

1 Decree embracing a defendant

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who had incurred no cost, furnishes no cause for reversal to the complainant in the bill. *Hickey vs Young*, 4

2 Decree cannot be rendered against a party who has had neither actual nor constructive notice. *Dawson, &c vs Clay's heirs*, 166

3 Decree for interest upon the aggregate of principal and interest decreed, until payment, erroneous. *Ibid*, 166-7

4 Decree against administrator in his own right unless he have been guilty of fraud or gross negligence, erroneous. *Ibid*, 167

5 Decree to appoint commissioners to make conveyance in vacation on failure of him against whom decree is rendered, not erroneous—otherwise when decree is for a deed on failure to pay money. *Johnson vs McGilvary*, 323

6 Decree, to authorize an appeal, must be final. *Graham &c. vs Noland's adm'r*. 329

7 Decree being uncertain is void. *Ballard vs Davis*, 377

8 Decree or judgment can only be reversed by party agrieved. *Pugh's heirs vs Bell's heirs*, 406

2 Decree not irregular when revivor by consent, though no appearance nor service of notice upon those against whom revived. *Ibid*, 406

10 Decree should be certain. *Honore vs Colmesnil, et vice versa*, 525

11 Decree right on the merits, and defendant served with process will not be reversed for irregularity. *Heath et als. vs Mitcherson*, 547

12 Decree should be certain and so should be the damages on the dissolution of the injunction. *Stagner vs Fox*. 556

Deeds.

See Acceptance. 1

1 To the validity of a deed or grant it is essential there should be grantor and grantee able and willing to contract, or subject matter in *esse* to be granted, and a present interest in the grantor; though an instrument may assume the form of a deed, be delivered to any other than the grantee, and be regularly recorded: if it be not accepted by the grantee, it is inoperative. *Beard &c vs Griggs*, 25

2 Deed for land must be recorded in the county where it lay, at the time of recording the same. *Garrison vs Haydon*, 222

3 Deed executed and delivered, passes title as perfectly, as feoffment and livery of seisin. *Breckenridge's heirs vs Ormsby*, 244

4 Deed of a lunatic is not void but voidable. *Ibid*, 245

5 Deed when voidable, may be avoided by *privies* in blood or in representation, not by privies in law or in estate. *Ibid*, 248

6 Deed may be avoided by purchaser of infant or lunatic vendor, when it might be avoided by the heir. *Ibid*, 248-9-50

7 *Vide* Ibid, 254

8 Deed absolute for personal property, if possession remain with vendor, as to creditors and purchasers without notice, fraudulent *per se*. *Head &c vs Ward &c.* 281

9 Deed recorded in time, constructive notice to purchasers and creditors. *Head, Hobbs, et al. vs Ward, et al.* 283

10 Deed for land transfers to the assignee by privity of estate, all antecedent covenants, incident to the freehold, the right of the assignee is co-extensive with

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that of the grantor. *McLanahan's devisees vs Kennedy &c* 335

11 Deed, conclusive of the rights conveyed, but not of the consideration paid. *Gu ly vs Grubbs*, 389

12 Acknowledgement of consideration to have been received in a deed, *prima facie* evidence of payment, but may be explained or contradicted. *Ibid*, 389-90-1-2

13 So far as deeds transfer or are intended to be the evidence of rights, they cannot be contradicted in th ir legal construction, by facts *aliunde*. *Ibid.* 390

14 Deed with special warranty, demands a good title in the vendor or obligor. *Williams vs Potts*, 597

Defeasance

Is matter of defence and if condition performed, available at law. *Bliss vs Branham*, 201

Defendant.

Defendant named in the bill but not served with process, nor advertised against, nor appearing, is no party. *Hickey vs Young*, 4

Demand.

Demand not necessary when a promise to pay in Commonwealth paper. *Bamers Wilson*, 203

Demurrer.

1 See Error, 5. *Case vs Rebelin*, 5

2 If joint demurrer to several pleas sustained, and any one good, it is error, if overruled, and any one bad, it is likewise error: practice dangerous to demurrant. *Cox &c vs Cooke*, 361

3 Though demurrer more regular, yet if plea rejected, cause will not be sent back for demurrer. *Depew vs Bank of Limestone*, 380

4 Demurrer waives the objection to th want of an oath to a plea. *Ingraham vs Arnold*, 407-9

Deposition.

1 Deposition retaken without leave of the court, not to be read; not affecting the merits, if read no cause for reversal. *Hickey vs Young*, 3

2 Notice on the 4th to take depositions on the 14th at a place 290 miles distant, unreasonable. *Kincaid vs Kincaid*, 100

3 To reject without notice depositions read on a former trial, without objection, good cause for a new trial. *Ibid*, 100-1

4 Deposition taken without notice should be rejected. *Honore vs Colmesnil, et vice versa.* 525

Descent.

Descent cannot be changed by conveyance but follows the law. *Bernard &c vs Griggs*, 36

Detinue.

1 Detinue will lie for a deed or note in writing, evidencing a debt or for any chattel which can be identified, to which plaintiff has a right of property and of immediate possession no matter how the defendant obtained possession. *Lewis vs Hoover*, 501

2 Vide Assumpsit. *Ibid*, 501

Devastavit.

1 Conviction of *devastavit* does not release administrator from his liability upon his bond; it only determines the extent of responsibility and binds him personally as well as in his fiduciary character. *Hobbs and Churchill, vs Middleton*, 178

2 Devastavit fixed upon the principal estops him from pleading

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no assets: the object of the suit to establish waste of assets and to charge him personally. *Ibid*, 180

3 To maintain an action against administrator or executor for *devastavit*, the demand must be ascertained by judgment and delinquency shewn by return of *nulla bona*. *Ibid*, 180

4 Devastavit fixed upon principal, the securities under the act of 1797 may plead no assets. *Hobbs and Churchill vs Middleton*, 182-3

5 Devastavit may be committed by converting equitable assets—and an executor subjected to a personal action thereby. *Loftus vs Locker*, 298

Devise.

1 Devise of land for which testator holds a bond for a conveyance determines his election and controls his representative to require a specific performance, if breach prior to the death of testator. *Dawson &c vs Clay's heirs*, 168

2 Devise of land by the parcel, the devisee is entitled to any surplus; and if lost, to contribution from other devisees; the will having charged all the estate devised, with such losses. *McLanahan's devisees vs Kennedy, &c.* 336

3 Measure of damages, the value of the land when devise took effect upon the loss of the land, and the amount to be made up to the devisee by contribution. *McLanahan's devisees vs Kennedy, &c.* 338

Devisee.

Devisee of land, under a will providing compensation, if any land be lost, if he have paid rent and lost the land, is entitled to the value of the land at testator's death; and interest from that time, added to the rent paid for occupancy, by the testator, as compensation. *M'Lanahan's h'rs. vs Kennedy, &c.* 339-40

Dissolution of Injunction.

To a recovery, in action on injunction bond, it is essential to shew the injunction has been dissolved. *Harrison vs Park*, 172

Distributee.

Distributee cannot be a witness for the administrator. *Caperton, ad'r of Karr vs Callison*, 397

Discontinuance of a Road.

1 See Appeal 4. *Cole vs Shannon*, 218-9

2 Order of discontinuance of a road, by county court, cannot be questioned by appeal or writ of error, by the owner of land, for want of sufficient interest. *Ibid*, 220-1-2

Dollars.

1 Dollars did not mean bank paper in 1821. *Fishback vs Woodford*, 87

2 Credit given for dollars, though payment made in depreciated paper, no deduction to be made for depreciation. *White's ex'rs. vs Guthrie et als.* 503

Dower.

See county court, 1. *Williams vs Williams*, 106

Ejectment.

1 To revive a judgment in ejectment against two, one of whom has died, *scire facias* must be issued against the heirs of the deceased, and the *terre-tenants*, or survivor. *Griffith's heirs vs Wilson*, 209

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2 To revive a judgment in ejectment, *scire facias* must shew that the term has not expired. *Ibid* 212

3 To a recovery in ejectment, paramount title in the plaintiff, and possession in the defendant, at the time of service of the copy are requisite. *Eastin vs Rucker*, 234-5

4 A record of a former judgment, in favor of defendant against lessor of plaintiff, no bar to plaintiff's recovery; unless connected with such adversary possession as tolls his right of entry. *Ibid*, 235

5 In ejectment if the record do not profess to exhibit the whole evidence, the admission of a deed as evidence, will not shake a verdict for plaintiff; though it might not have been strictly admissible. Had it been excluded, it only would show the plaintiff did not derive title through that deed. *Hodges vs Crutcher*, 504

Election.

1 In rendering judgment, on a note for "current paper," more proper to give debtor election to pay in Kentucky or common'th. bank paper. *Feemster et al. vs Johnson*, 68

2 Vide debtor and creditor 1.

3 Vide devisee 1.

Emancipation.

Act of emancipation, having passed the General Assembly, the person to be deemed free, until disfranchised. *Conclude vs Williamson, &c.* 17

Entry.

Entry, for land, calling for a spring or other object which gives it location, if there be two or more such objects shewn in vicinity, so that surveys, executed on each, for the quantity intended, will include any portion of the same land, in common, it being, to that extent, certain to a subsequent locator, is good. *Parker et als. vs Marshall*, 353-4

Equity Prior.

A, claiming prior equity, sues B, holder of equitable title; to recover against B, A must prove that B is purchaser, with notice of his equity. *Nall's heirs vs Combs.* 325

Error.

1 Error apparent on the record, requires no notice of motion to correct it; but when not apparent, it does. *Payne &c vs Cowan*, 12

2 Error in rendering judgment for or against a dead person, only to be corrected by writ of error, *coram vobis*. *Case vs Ribelin*, 29

3 Error in first process, cured by correct process, executed in time. *Ibid*, 30

4 Error prior to judgment may be corrected by obligor in replevy bond. *Ibid*, 31

5 Error in fact, well assigned, should be traversed; *if* not well assigned, it is a subject of demurrer. *Ibid*, 32

6 Error to enter judgment upon a note stipulating to pay "current paper," for more than the nominal amount of the note. *Feemster et als vs Johnson*, 68

7 Error to admit proof variant from the allegation. *Clarke vs Castleman*, 73

8 Error to dismiss a bill absolutely when the proper parties were not before the court. *Rowland vs Garman*, 76-7

9 Error to give judgment for interest, upon a note executed out of this state, without proof of the rate of interest where note was executed. *Morgan vs Trotter, &c*, 94

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10 Error to render judgment in bar, upon overruling demurrer to plea to the jurisdiction. *Hay vs Arberry*, 95

11 Not error to render judgment on former judgment for damages, without allowing interest. *West vs Patrick's adm'r*, 95

12 Error to award restitution to defendant in ejectment after the revival of a judgment, subsequently to a reversal of first revivor, plaintiff having obtained possession by *habere facias*. *Smith's heirs vs Mitchell's heirs*, 271

13 Error to render judgment against three, two only served with process; though the record states that the "defendants appeared," or that the "parties appeared." *Violet vs Waters*, 303

14 Error to permit a party, in whose favor conveyance of legal title to land has been decreed, upon payment of money, to withdraw the sum deposited in court, unless the decree be changed as to conveyance. *Hopkins vs Stephenson*, 346

15 Error to make agreement entered into, *pendente lite*, basis of a decree, unless brought before the court by amendment, or by consent given in open court. *Leach vs Gentry*, 351

16 Error to quash the sale bond, and not to quash the sale. *Cooper &c vs Hatter &c*, 359

17 Error to quash bond which is good at common law, though bad as a statutary bond. *Ibid*, 358-9

18 Error lost in consent. *Pugh's adm'rs vs Bell's heirs*, 406

19 Error to allow interest on a note executed out of the state, without the intervention of a jury. *Ingraham vs Arnold*, 408

20 Error to instruct the jury, that unless they can precisely fix the position of a corner, they must recur to the extension of the courses and distances. *Wallace vs Maxwell*, 452

21 Error to give judgment for execution upon *scire facias*, against an infant, unless a guardian *ad litem* be appointed, or an appearance entered. *Rowland's heirs vs Cocke's adm'r*, 453

22 Error to allow costs to defendant when an injunction is perpetuated for more than is credited at law. *White's ex'rs vs Guthrie et als*, 503

23 Error to decree damages on dissolving an injunction without ascertaining the amount specifically. *Ibid*, 503

24 Error to enter judgment for restitution, when the warrant charges "forcible entry," and the verdict is for "forcible detainer." *Gayle vs Overton*, 549

25 Error to refer the ascertainment of damages, on the dissolution of an injunction to the clerk. *Stagner vs Fox*, 556
Also *Noland vs Richards*, 582

26 Error to decree damages twice, *Noland vs Richards*, 583

27 Vide chancery practice, 3

28 Vide costs, 5.

29 Error to pronounce a decree at appearance term. *Passmore's heirs vs Moore*, 592

30 Error not to allow time after full age in decree against infants. *Ibid*, 593

31 Error to dismiss bill for conveyance, if title in vendor complete. *Williams vs Potts*, 597

32 Error to decree costs against complainant, who had a right to go into chancery. *Ibid*, 597

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Error, coram vobis.

1 The statute of 1802 regulating writs of error *coram vobis*, does not apply to the mode of correcting errors in fact, accruing before judgment. *Case vs Ribelin*, 3

2 If second process regular, and executed in time, irregularity of first or antecedent process void. *Ibid*, 30-1

3 Writ of error *coram vobis*, issuing prior to return of first execution on replevy bond, in time. *Ibid*, 31

4 Notice not necessary to enable plaintiff to apply for writ of error *coram vobis*, with supersedeas to correct errors occurring before judgment. *Ibid*, 31

Escape.

1 Sheriff liable for escape notwithstanding the prisoner might be discharged by a single justice of the peace, without surrendering a schedule. *Gordon vs Ryan*, 56

2 Escape can take place, only from actual custody. *Ibid*, 58

3 To make officer liable for escape, The capture or actual custody of the person by the officer must be proved. *Ibid*, 58-9

Escheat.

1 Slaves not subject to escheat, but pass to administrator as assets. *Conclude vs Williamson, &c*, 18-19

Estoppel.

1 If grantor with warranty, have no title at the date of his grant; after-acquired title enures to grantee by way of estoppel. *Beard &c vs Griggs*, 27

2 Obligor in replevy bond, not *estopped* from correcting errors, which accrued prior to judgment. *Case vs Ribelin*, 31

3 Estoppel may be created by recitals in a deed, and effectually applied to parties and privies. *Breckinridge's heirs vs Ormsby*, 255

4 Defendant estopped from questioning the existence of plaintiff, at date of note sued on. *Depew vs Bank of Limestone*, 382

5 If party contract with one separately, he is estopped from alleging a partner-ship, and from setting off payments made to another. *Trustees of Perryville &c vs Letcher*, 335

6 A party is estopped by his deed so far as the deed passes a right, or extinguishes a title; but so far as it merely asserts a fact, independent of the right, he is not concluded. *Gully vs Grubbs*, 390

7 Deeds operate as an estopel; patents are only *prima facie* evidence of the facts recited. *Wallace vs Maxwell &c*, 450-1

Evidence.

1 Parol evidence not competent to rescind a contract for land, on the allegation of a better outstanding title, known and concealed by the seller; but the title papers must be shown to the court, and proof made that they include at least a part of the purchased premises and constitute a better title than sold. *Wilson vs Lafoor*, 7

2 Profert of a deed, and allegation of its operation, without making the deed a part of the record, no evidence of its contents or of its effect. *King vs McLean*, 33

2 Reservations of interest by separate note, accruing on contract for Commonwealth's bank notes, conclusive of a loan. *Boswell vs Clarkson*, 50

4 Evidence that mare was unsound at the time of sale, not sufficient to charge the seller; the *scienter*

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and concealment must be shewn. *Howell vs Freeman*, 54

5 Entry on record that bail surrendered principal to the court, and that he was prayed into custody, not adequate evidence that party was ever in custody of the sheriff so as to charge him for an escape. *Gordan vs Ryan*, 54

6 Parol evidence competent to prove fraud or mistake, in any written instrument. *Fishback vs Woodford*, 86

7 For parol proof to contradict the terms of a written instrument, or vary its stipulations, there must be fraud or mistake in the instrument. *Ibid*, 87

8 To alter or modify the terms of a written instrument, it is necessary to prove some fact, independent of the consideration, establishing fraud or mistake. *Ibid*, 87

9 Evidence of a rumour of a second marriage, in question of a right of dower, not admissible. *Williams vs Williams*, 106

10 Judgment for devastavit against administrator or executor, conclusive of assets. *Hobbs &c vs Middleton*, 180

11 Return of "*nulla bona*" *prima facie* evidence of breach of conditions of administration bond against principal and securities. *Ibid*, 190

12 When no evidence certified, the presumption is in favor of the legality of the proceedings of the court below. *Talbot vs Miller*, 199

13 See ejectment. 5.

14 If a record offered in evidnnce do not conduce to sustain or defeat the issue, to reject it not error, though between the same parties. *Bate vs Lewis' ex'rs*, 315

15 Evidence being ballanced, court should not set aside the verdict, whether for plaintiff or defendant. *Ibid*, 317

16 If the evidence on which instructions are intended to bear, be not presented by the record, the court will not adjudge the instruction to be erroneous. *Harrison vs Baker*, 318

17 To justify the admission of parol testimony in contradiction to the stipulations of a written instrument, fraud or mistake must be alleged. *Love vs Coffee et als*, 327

18 If plaintiff entitled to recover without the evidence offered and rejected; yet if the evidence were calculated to strengthen his case, it is an injury to him to exclude it and erroneous. *Dougherty's adm'r vs Goggin*, 375

19 An acknowledgment in a deed of the receipt of the consideration, is only *prima facie* evidence of the payment, and may be explained or contradicted. *Gully vs Grubbs*, 389

20 So far as a deed merely asserts a fact, independent of the right, and unessential to the title, it is not conclusive of such fact. *Ibid*, 389

21 No fact to be presumed which does not necessarily result from established or conceded premises. *Wallace vs Maxwell*, 451

23 No evidence admissible under the plea of covenants performed, except to show performance. *Hoofman vs Sharp*, 489

23 Difference between the evidence of knowledge as to personal property and land, requisite to charge sheriff for failing to levy. *Bell vs Commonwealth &c*, 552-3-4

24 Possession of personal property is *prima facie* evidence of ownership. *Ibid*, 553

25 Possession of land not *prima facie* evidence of ownership. *Ibid*, 554

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25 Incomplete replevy bond, in hand writing of deputy sheriff admissible in action against principal to prove the execution was in the hands of the deputy, and when. *Ibid*, 555

27 Upon appeal to circuit court by Plaintiff, before a magistrate, from judgment given against him on notice of set-off, his account no evidence to prove itself; but must be proved. *Morgan vs Boone*, 586

Exceptions, Vide bill of.

Exceptions to report of Commissioners in Chancery will be heard at any time prior to final decree. *Honore vs Colmesnil*, 510

Execution.

See Sheriff, 1.

1 Sheriff's return on execution, of certain sums made but "not paid to the plaintiff" does not justify quashal of the return, but charges sheriff with the amount of money made. *Payne &c vs Cowan &c.* 12-13

2 When errors, apparent in the record, are the grounds of motion for quashing the execution, no notice necessary, but when not apparent in the record there must be notice. *Ibid*, 13-14

3 Execution may issue within the time given to execute an appeal bond. *Ereeman & Ewell vs Patton*, 193

4 Notwithstanding execution may be replevied, court will inspect the whole proceedings and will not permit that to be done by indirection which could not have been done directly. *Hardin vs the Governor &c.* 302

5 If execution be quashed, the revising court will not reverse the judgment of the court below at the instance of the party applying for the quashal of the execution, the consequences of the judgment in his favor being coextensive with the end sought to be attained; because the court below quashed the execution on grounds different from those assumed by the applicant. *Todd and Lindsay vs McLanahan's heirs*, 385

6 Execution cannot issue upon a decree for damages, which does not specify the amount or give the *data* by which it can be ascertained. *Ballard vs Davis*, 37

7 Execution may issue, notwithstanding an order for a new trial on payment of costs *twenty* days before next term. *Gains vs Daily*, 476

8 Money paid on execution cannot be recovered in equity, unless the creditor had procured the payment fraudulently. *Hunt vs Boyer*, 484

9 If the defendant have property in the county subject to execution, and within knowledge of the sheriff, his duty to make sufficient levy before the return day. *Bell vs Commonwealth &c.* 551

Executors and Administrators

Are embraced by the 13th section of the act of 1726, "establishing the Court of Appeals;" bound for costs when appellants or plaintiffs in error. Costs may be adjudged against them when appellants or appellees, at the discretion of the court. *Scroggin's adm'r vs Scroggin*, 363-4

Federal Court.

1 The 12th section of the act of Congress, approved Sept. 24th, 1789, prescribes the mode of removing a suit from a State court to the Federal Court. *Easton vs Rucker.* 232

2 To remove a cause into the Federal Court from a State Court, under the provisions of the Con-

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stitution of the United States, the applicant must be proved to be a citizen of a different state from that in which the suit is brought, and the application for removal must be made during the term at which such applicant enters an appearance. *Ibid*, 232

Forcible Entry and Detainer.

1 The warrant being for both, the finding of either is sufficient. *Swartswelder vs U S. Bank*, 44

2 A traverse puts in issue the truth of the inquest and waives all irregularities. *Ibid*, 45

3 The force intended by the statute is an entry, or a detainer against the will of the owner or occupant *Ibid*, 46

4 See Error. *Gayle vs Overton*, 550

Fraud.

1 In a sale, fraud cannot be plead in bar to an action for the consideration, unless there has been a tender of the thing purchased and an offer to rescind. *Bain vs Wilson*, 203

2 See Mortgagor and Mortgagee, 2. *Bucklin vs Thompson*, 227

3 See Mortgage, 3, 4.

Frauds and Perjuries.

1 Statutes of frauds and perjuries do not apply to a direct undertaking by parol, to pay the debt of another upon valuable consideration moving from the promisee, whether to the promissor or to another. *Haydon vs Christopher*, 383

2 Statutes of frauds and perjuries do not apply when the contract of sale of land is in writing, though the consideration be reserved by parol. *Gully vs Grubbs*, 388

3 Statutes of frauds and perjuries do not apply to resulting trusts. *Pugh's heirs vs Bell's heirs*, 403

Freedom.

Freedom not to be questioned collaterally, nor by any one who does not assert a right of property in the person claimed, or a lien on him, or her. *Conclude vs Williamson &c.* 17

General Court.

1 Since the act of 1825, General Court has no jurisdiction over a sum less than five hundred dollars. *Morgan vs Froth & Needles*,

2 General Court is a court of limited jurisdiction——declaration must contain averments which will give jurisdiction. *Ingraham vs Arnold*, 407

Grantor and Grantee.

If grantor with warranty have no title at the date of his grant; after acquired title enures to grantee by way of estoppel. *Beard &c vs Griggs &c*, 27

Grant or Deed.

1 Grant or deed though perfect on the part of grantor, yet if not accepted by the grantee, has no effect. *Beard vs Griggs*, 25

2 To the validity of grant or deed it is essential there should be grantor and grantee able and willing to contract, a subject matter, *in esse*, to be granted, and a present interest in the grantor; though an instrument assuming the form of a grant, be delivered to any save grantee and recorded, if it be not accepted by grantee it is inoperative. *Ibid*, 25

Guardian Statutory.

1 Guardian Statutory, cannot legitimately commute the debts due his ward, if he do, he is re-

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sponsible for principal and interest. *Forbes's heirs vs Mitchell*, 441

2 Quaere. Whether does insolvency of debtor constitute an exception. *Ibid*, 441

Guardian ad Litem.

See Error, 18.

Husband and Wife.

1 Choses in action which belonged to the wife before marriage, or which accrued to her during marriage; unless reduced to possession or appropriated by her husband, in his lifetime, survive to the wife, she surviving husband. If the husband survive, they belong to him, under the statute of distributions. *Miller vs Miller*, 169

2 If cause of action has its inception prior to marriage, husband and wife may unite; if it accrue after marriage, husband must sue alone, if it relate to personalty. *Fightmaster vs Beasley*, 606

Indebitatus Assumpsit.

Vide Assumpsit.

Indebitatus Assumpsit cannot be maintained when the consideration for work and labor was part of the crop. *Cochran vs Tatum*, 394

Independent Covenants & Promises.

1 Independent Covenants & Promises may be sued on reciprocally without alleging performance. *Sharp vs White*, 106

2 When promises independent, not necessary to right of action to aver performance. *Henderson vs Richards*, 490

Infants.

1 Infants are privileged to affirm or annul their contracts. *Breckenridge's heirs vs Ormsby*, 240-1.

See Error, 18, 25.

2 A general principle, no deed made by infant is void for infancy alone. *Ibid*, 24

3 Infants can only avoid an act done of record, pending infancy, otherwise as to acts *en pais*. *Ibid*, 252

4 Any act after twenty-one, disavowing a deed delivered during infancy, of equal solemnity with the deed, annuls and avoids the deed. *Ibid*, 252-3

Inheritance.

1 Inheritance in expectancy, lies not in livery nor in grant; nor can it be subject of contract. *Beard &c vs Griggs*, 26

2 A deed for the heritage or the chance of it would be inoperative. *Ibid*, 26

3 The line of descent cannot be changed by deed. *Ibid*, 26

Injunction.

1 Injunction perpetuated in *part*, frees the complainant from *costs*. *Hoofman vs Marshall*, 65

2 To a recovery in action on injunction bond, it is essential to shew the injunction has been dissolved. *Harrison vs Park*, 172

3 Injunction bonds bind securities, as well as principals, according to stipulations, as for damages, &c. though the law is silent. *Ibid*, 173

4 Plea denying the dissolution of injunction, bar to an action on injunction bond. Plea that a second injunction had been obtained, no bar. *Cates &c vs Wooldridge*, 269

5 Upon dissolution of injunction, he who had no right to go into Chancery should pay costs and damages. *Hampton vs Dudley*, 275

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Injunction should not be granted to a party who has a remedy at law, unless under peculiar circumstances. *Ellis vs Gosney's heirs*, 348

7 The acts of Assembly giving damages do not apply to injunctions *decreed*, but to injunctions granted before final decree. *Ballard vs Davis*, 478

8 When injunction perpetuated for more than is credited at law, to give costs is erroneous. *White's ex'rs vs Guthrie et als.* 503

9 To decree damages upon dissolution of injunction, without ascertaining the amount specifically, is erroneous. *Ibid*, 503

10 Injunction dissolved, duty of court to state the rate of damages, the sum on which decreed, being stated; or if the sum be not stated, to calculate and decree the amount. *Stagner vs Fox*, 556

Instructions.

1 Refusal to give instructions as in case of nonsuit, though erroneous, at the time, no cause of reversal, if the plaintiff afterwards introduce testimony to cure the defect. *Clark vs Castleman*, 70

2 Proper mode of instructing a jury, is hypothetically. *Bucklin vs Thompson*, 226

3 When the evidence is all on one side and is clear, uncontradictory and positive, peremptory instruction may be allowed, but even then it would be unusual. *Ibid*, 226

4 Instructions should be conditional, not peremptory, when given to a jury. *Bate vs Lewis's ex'rs* 316

5 If the evidence on which instructions are intended to bear, be not presented by the record, the court will not adjudge the instructions to be erroneous. *Harrison vs Baker*, 318

6 Court will not presume plaintiff to have been prejudiced by instructions given at the instance of defendant, unless it appear that plaintiff would be entitled to recover, had the instructions not been given. *Ibid*, 318

7 To instruct the jury that unless they can precisely fix the position of a corner, they must recur to the extension of the courses and distances, is erroneous. *Wallace vs Maxwell &c.* 455

Interest.

1 Contract for borrowing and lending established by the reservation of interest. *Boswell vs Clarkson*, 50

2 Note for payment of money on a particular day, *with interest*, runs from the day of the date. *Winn vs Young*, 52

4 Interest not allowable on a decree for an aggregate of principal and interest. *Dawson vs Clay's heirs*, 166

3 See Error. *West vs Patrick's ad'r.* 195

5 See Error. *Ingraham vs Arnold*, 408

6 Interest not given for a failure to sell property, which a party as agent agrees to sell for another. *Harris vs Ogg*, 412

7 Discretionary with the jury to give or refuse interest when one owes another property and fails to pay it when due. *Ibid*, 412

8 Interest is given for withholding a debt when due. *Ibid*, 412

9 Interest on foreign notes, judgments &c. must be found by a jury. *Johnson vs Williams*, 490

Interlocutory Decree.

1 Interlocutory Decree is always under the control of the Court rendering it. *Hays vs May's heirs*, 498

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2 Interlocutory Decree may be set aside for answer to be filed. *Ibid*, 498

3 Any order in the progress of a cause before the decree can be rendered certain or effectual, is interlocutory. *Ibid*, 498

Issues.

1 See Jury, 2. *Bate vs Lewis's ex'rs.* 316

2 Issues on insufficient pleas, immaterial. *Coxe &c. vs Cooke*, 361

Joinder in action by Plaintiffs.

1 An appeal bond payable "to the heirs of H." embracing the husbands of his daughters, they may maintain an action, jointly, in their proper names, styling themselves the heirs of H. for breach of condition of the bond *Evans vs Hardwick's heirs*, 436

2 If cause of action is complete, or has its inception before marriage, husband and wife may unite. If it accrue after marriage, husband must sue alone if it relate to personalty. *Fightmaster &c vs Beasley*, 606

Justices of Peace, Jurisdiction of.

In 1826, justices of the peace had no jurisdiction over accounts in Commonwealth paper exceeding five pound. The act of 1824, session acts, p. 397 does not apply to accounts.
When justice of the peace renders judgment for a sum greater than falls within the appellate cognizance of County Court, and over which he had no jurisdiction, the party injured must apply for correction to the Circuit Court. *Elledge vs Wilson*, 588

Judgment.

1 Judgment rendered against a dead person, to be corrected by *writ of error, coram vobis. Case vs Ribelin*, 29

2 See Error, *Feemster &c vs Johnson*, 65

3 See Error, *Hays vs Arberry*, 95

4 Judgment against administrator concludes the securities as to the nature of the demand. *Hobbs and Churchill vs Middleton*, 179

5 Quaere. If creditor had obtained his judgment by fraud, whether bill in Chancery be not the appropriate, if not the only remedy, for the securities? *Ibid*, 179

6 Two judgments not necessary against administrator or executor, before a suit can be brought against them or their securities, or their official bond. *Ibid*, 192

7 Judgment not to be reversed, unless error appear in the record. *Talbot vs Miller &c.* 195

8 Judgment being entire and including error, must be reversed *in toto*. *Burris &c vs Johnson*, 199

9 Judgment obligatory, until reversed, notwithstanding it may be erroneous. *Smith's heirs vs Mitchell's heirs*, 271-2

10 Judgment though erroneous, obligatory until reversed, unless fraudulent in its obtention. *Hampton vs Dudley*, 276

11 Judgment against executor or administrator, by default, after judgment *quando acciderint* in a former action, not conclusive of assets since the act of 1811. *Loftus vs Locker &c.* 290

12 Judgment for more than the plaintiff demands in his writs and declaration, is erroneous. *McKinney &c vs Commonwealth*, 339

13 Judgment quashing execution, not to be questioned by a person at whose instance it is rendered, when coextensive with the object aimed at. *Todd and Lindsay vs McLanahan's heirs*, 356-9

14 Judgment or decree against administrator or executor for costs without express direction to the contrary, is always intended to

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bonis testatoris. *Scroggin's adm'r vs Scroggin.* 365

15 See Interest, *Ingraham vs Arnold,* 408

16 Judgment will not be opened on a record which does not exhibit the whole evidence, even if some received, should have been rejected as irrelevant. *Hodges vs Crutcher,* 504

Juridical Days.

None but juridical days are calculated in ascertaining whether the return day of a writ, be anterior to its test. Sundays are excluded. *Brown vs McKee,* 403

Jurisdiction.

1 Circuit Court has no jurisdiction to grant injunction for *three dollars. Noland vs Johnson,* 11

2 See General Court, *Morgan vs Froth and Needles,* 94

3 Ample defence at law, Chancellor will not interfere unless good reason be shewn for not making such defence. *Hampton vs Dudley,* 274-5

4 The nominal amount, not the real, intrinsic value of a demand in Commonwealth's paper, gives jurisdiction. *Gentry vs Gilkey,* 373

5 The alteration of a writing, cannot be taken advantage of, to defeat the writing by bill in Chancery, unless satisfactory reason be given, why *non est factum* not plead at law. *Trustees of Perryville &c vs Letcher &c.* 385

6 Where jurisdiction of the Court is limited, the declaration in a suit brought in that court, must contain the averments necessary to give it jurisdiction. *Ingraham vs Arnold,* 407

7 To give jurisdiction, either the thing to be acted on or the person of the defendants or some one of them, must be within the circuit of the court. *Brown vs McKee,* 474

8 When cause of action transitory, Chancellor has no jurisdiction, by bringing defendant before the court with process, directed to the sheriff of a different county, from that in which suit is instituted. *Brown vs McKee &c.* 474

9 Appearance and defence to the merits, a waiver to all objection to jurisdiction, the court having cognizance of the subject matter in controversy; but when a party resists a decree and is refused permission to answer making a motion to be permitted to answer, and the arguments of counsel against a decree, cannot be construed such an assent to the proceedings, as will yield jurisdiction. *Brown vs McKee's representative,* 475

10 Consent cannot give jurisdiction, the tribunal not having cognizance by law over the subject matter. When the court has such cognizance, the consent may. *Ibid,* 476

11 Chancellor has no jurisdiction to set aside a common law judgment, by decreeing a new trial peremptorily, nor to compel the creditor to restore money paid on it, unless it had been obtained fraudulently. *Hunt vs Boyer,* 495

Jury.

1 Jury have the right to weigh and determine the character and credibility of the testimony, when various or contradictory, free from the control of the court. *Bucklin vs Thompson,* 227

2 Jury sworn to try "the issue" there being several "issues" is not error. *Bale vs Lewis's ex'rs.* 316

3 Jury may find a verdict on their own knowledge, of the price of labour. *Craig vs Durrett,* 366

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4 Jury will compare and weigh evidence, but the court will decide on its relevancy to the issue. *Wallace vs Maxwell &c.* 449

5 Jury have the right to judge of the credibility of witnesses, but if no evidence conducing to sustain verdict, the court will interpose. *Ibid,* 449

Land.

1 Land held by bond, and devised to be sold, is an election by testator to have the land, and binding on his representatives. *Dawson vs Clay's heirs,* 169

2 Lien of the vendor on land, first to be satisfied. *Mosely vs Garrett,* 215

3 If agent sell land and enter into covenants not warranted by his authority, the purchaser may at his election enforce so much of the contract as conforms to the authority, or claim a recision of the whole, if the principal will not enter into the covenants. *Vanada's heirs vs Hopkins adm'r* 294

4 Land devised to be sold, for the payment of debts, equitable assets. *Loftus vs Locker,* 298

Lapse of Time.

Bill to question the acts of administrators or executors after settlement in the county court, acquiesced in for 20 or 30 years by guardian and complainant, and after complainant of age, 12 or 13 years, not to be tolerated. *Skinner vs Skinner &c* 594

Law.

1 Blackstone's definition of law, not applicable to the character of our institutions, and the restricted power of the Legislative Departments. *Davis vs Bullard,* 576

2 Law is a rule of civil conduct prescribed by a competent authority. *Ibid,* 577

3 The act of 1827, does not divest any right or infringe the restrictions as to "ex post facto laws," or laws impairing the obligation of contracts, or impairing contracts, either in the Constitution of the United States or of Kentucky, and is valid. *Ibid,* 576

Legislative Act.

Legislative act to be construed prospective unless expressly to the contrary; if it operate upon vested right, or upon contracts; then void if it impair the obligation of contracts. *Head &c vs Ward &c.* 253-6

Lien.

1 If vendor have lien upon land for the purchase money, and the purchaser mortgages the land upon bill filed by mortgagee to foreclose, the court should decree a sale, and appropriate the proceeds, first to discharge the lien of the vendor and then the mortgage. *Mosely vs Garrett,* 215

2 If person holding a lien, or having the legal title to real property, stand by and see that property mortgaged or sold, *and do* not assert his right, or warn the mortgagee or purchaser, he is in equity considered as waiving his lien. *Ibid,* 216

Limitation, Statute of.

1 Time of limitation does not run between *cestui que trust* and the trustee. *Overstreet vs Bate,* 370

2 Statute of limitation will not be applied in Chancery, to party seeking relief against fraud, until after the fraud is fully discovered. *Pyle vs Beckwith,* 445

3 Limitation begins to run at law from the time of committing the fraud. *Ibid,* 445

Lis-Pendens.

Li Pendens gives preference to creditor. *Dana vs Brown &c.* 306

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Loan.

1 Loan on a contingency, as the appreciation or depreciation of bank paper, no usury. *Wilson vs Kilbourn*, 494

2 Loan indispensable to usury. *Shackleford vs Morris*, 497

Lunatics.

1 The acts of lunatics are voidable, not void. *Breckenridge's heirs vs Ormsby*, 239

2 Deed of lunatic passes a present interest *Ibid*, 245

Lunatics and Infants.

Their acts are alike void or voidable. *Breckenridge's heirs vs Ormsby*, 238

Manumission.

Deed of manumission, the guardianship of the infant, reserved to the grantor; the right is personal, and ends with his death. *Emily vs Smith*, 593

Mayor of Louisville.

Mayor of Louisville has no power to recognize to appear, unless before the Circuit Court. Power limited to inquiry, committal, discharge or recognizance of the Circuit Court. Cannot recognize to appear before himself at a future day, such recognizance void. *Commonwealth vs Edwards*, 352

Money.

Money paid on execution at law will not be restored by chancery while the judgment remains in force. *Hunt vs Boyer*, 484

Mortgage.

1 Mortgage being paid off, the title reverts without release. *Breckenridge's heirs vs Ormsby*, 258

2 The payment of a mortgaged debt, whether before or after forfeiture, extinguishes the debt; and the title vests in mortgagor or his assignee, without release or re conveyance. *Ibid*, 258-9

3 If prior in its origin, mortgage not vitiated by possession of mortgagor, after forfeiture. *Head, Hobbs, et als vs Woods*, 281-2-3

4 Possession in mortgagor compatible with the terms of the mortgage; and no evidence of fraud. *Ibid*, 281-2-3

5 Mortgage on a conditional sale, may be contingent. *Hopkins vs Stevenson*, 342

6 Whether mortgage or conditional sale, depends upon the facts attendant on each case. If grantee pay the whole consideration, it will be evidence of conditional sale. *Ibid*, 242

Mortgagor and mortgagee.

2 Mortgagor remaining in possession of mortgaged property, before condition broken, no evidence of fraud; after condition broken, it may be. *Bucklin vs Thompson*, 227

1 If mortgagor has received advances of mortgage, to value of the thing mortgaged at the date of the mortgage; and has delayed to redeem an unreasonable length of time, the chancellor will not interpose to enable him to redeem against mortgagee in possession, to the injury or prejudice of mortgagee. *Hopkins vs Stevenson*, 344

Motion.

1 Motion to quash return on execution, notice not necessary. When error apparent in the record, *aliter*, when not manifested by the record. *Payne &c vs Cowan &c*, 13-14

2 Motion to quash replevy bond, should make all the obligors parties. *Frame vs Tribble*, 205

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New Trial.

1 New trial to be granted when rights of a party have been wantonly, or inadvertently compromitted by counsel. *Winn vs Young*, 52

2 When verdict not the result of compromise of doubtful rights, but of the error of the court, or the mistake of the counsel, transcending his powers, new trial to be granted. *Ibid*, 52

3 In cases *ex contractu*, when the evidence preponderates decisively against the verdict, or there is no evidence to sustain the amount of the verdict, a new trial should be ganted. *Kirtley vs Kirtley*, 97

4 When the defendant discovers an alteration on the face of an instrument tendered, at a period so late, that he can neither plead an additional plea nor move for a continuance, it is good cause for a new trial. *Ibid*, 97

5 New trial to be granted, when the justice of the cause has not been fairly and fully tried, owing to some omission, oversight or surprise, which may be exercised or obviated. *M'Kinney vs Commonwealth*, 320

6 Verdict in part against law and evidence, a new trial must be granted. *Royal's adm'x and heirs vs Bryan*, 435

7 Not necessary to make formal motion for new trial, if all the evidence appear in the record. *Wallace vs Maxwell*, 452

8 Complainant's attorney going into trial unprepared, and suffering a verdict against his client, in his absence, no ground for a new trial. The discovery of new testimony relevant to the issue, which might have been had on the trial, by the use of industry, no ground for new trial. *Barnes vs Jones*, 470

9 A chancellor may direct a new trial at law, where the common law judge would, provided sufficient reason be given for not having applied to the common law judge. *Cummins vs Boyle*, 486

10 The allegation of absence on private business, insufficient discovery of new testimony or additional witnesses, to points in issue, no ground for new *trial*. *Ibid*, 486

11 If a party, knowing a witness to be absent, voluntarily risks a trial, no new trial can be granted, on account of alleged surprise, arising from the absence of such witness, no matter how important the facts which it may be positively averred such witness would have proved. Not necessary that the general issue and similiter, should be spread upon the record. Note that they were filed sufficient. *Gill vs Warren's adm'r*, 590

Non Assumpsit.

Non assumpsit puts the *plaintiff* on full proof. *Clarke vs Castleman*, 72

Non est factum.

Non est factum, the proper plea for avoiding an altered writing. Special circumstances only, can render the case cognizable in chancery. *Trustees of Perryville &c vs Letcher*, 385

Notice.

1 Notice of protest need not be given to a drawer, having no funds in the hands of the drawee. *Clarke vs Castleman*, 72

2 Deed recorded in time, supersedes the necessity of actual notice to creditors and purchasers. *Head &c vs Ward &c*, 283

3 Notice of a set-off does not admit the plaintiff's demand, nor waive proof of its justice, though

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plea of set-off does. *Morgan vs Brown*, 585

4 Notice against absent defendants should state in the proof of publication, the real time. *Passmore's heirs vs Moore*, 591

Nulla Bona.

Return of "*nulla bona*" on first execution against executor or administrator, is such evidence of breach of conditions of the bond, as entitles a creditor to an action on the bond against principal and securities or either of them. *Hobbs & Churchill vs Middleton*, 189-90

Obligor.

Obligor bound to pay paper currency, must seek the payee and tender the paper. *Bain vs Wilson*, 203

Obligor in replevy bond.

See estoppel. *Case vs Ribelin*, 31

Occupant.

When occupant neglects for nine months, to cause commissioners appointed at his instance, to act, the court will set aside the order appointing them, and grant successful claimant writ of possession. *Hord vs Bodley*, 79

Occupant Law.

1 Occupant law does not extend to purchaser with notice of a prior equity. But his case is to be ruled on principles of equity. *Pugh's heirs &c vs Bell's heirs*, 404

2 Occupant law of 1820, adjudged constitutional. *Conn's heirs vs Manifee*, 478

Office de facto.

Office *de facto*, cannot exist under our constitution, it only results from necessity, when there is a total subversion of the legal government, and an usurpation of all the powers of sovereignty. While the executive and legislative departments remain, there can be no *de facto*, judicial department. *Hardin's heirs vs M'Intire's devisees*. 207-8

Omission.

1 Omission of proper parties in the pleadings, warrants a reversal in both law and equity. *Clarke &c Yates &c*, 194

2 Omission to make persons parties, who are only nominally interested, irregular, but not cause of reversal. *Breckenridge's heirs vs Ormsby*, 257

Orphan.

Orphan not to be bound out until the person having the care of him or her, be first notified. *Coffee vs Watt*, 366

Order of Court.

1 Order of Court to convey land in vacation, is legal, provided there be no condition precedent, as to pay &c; when with such condition it is illegal. *Johnson vs M'Gilvary*, 322

2 Order of court for reviving a suit, illegal, unless an answer has been put in before abatement. *Nall's heirs vs Combs*, 325

Parol Contract.

Parol Contract not absolutely void for land, but will not be enforced if resisted. *Rowland vs Garman*, 76

Parties.

1 Parties in orders of Court, mean those only, who are before the court on record. *Keith vs Gore*, 8

2 Executor necessary party to any proceedings, instituted to set aside

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a will, of which he is executor. *Clark vs Yates*, 194

3 Party to avail himself of statute in derogation of the common law, must bring his case strictly within the statute. *Bain vs Wilson*, 204

4 A and B are joint purchasers of land from C; A sells his interest to D; D substitutes his bonds with C for the price. B and C lay off to D a given quantity as his proportion, upon bill, filed by the administrator of D, to have a credit for deficiency in the land upon the charge of fraud in representation, B and the heirs of D are necessary parties *Vanmeeter vs William's admrs*, 561

5 Parties in interest are necessarily so to the suit. *Ibid*, 561

Partners and Partnership.

1 If one of several partners, mortgage his interest in partnership property and becomes insolvent, the other partners cannot divert the property from the object of the mortgage and apply it to the discharge of the debts of the firm. *Mosely vs Garrett &c.* 217

2 The terms of partnership not reduced to writing, nor established by parol, the law implies equality of gain and loss. *Honore vs Colmesnil, &c.* 506

3 In ascertaining the rights of partners, the implication or interence of law to be pursued, unless countervailed & satisfactory evidence. *Ibid*, 516

4 A and B are engaged in bargeing, and have a settlement, afterwards they form a partnership as grocers and disagree; the settlement not to be disturbed, unless upon clear proof of fraud or mistake. *Ibid*, 517

5 Improper to blend individual and firm accounts. *Ibid*, 517

6 Lapse of time after a settlement and a note given for balance due a strong ground for refusing to look behind the settlement. *Ibid*, 518

7 One partner not entitled to participation in the real estate acquired by another, unless purchased on joint concern. *Ibid*, 519

8 Property acquired in the name of a firm, foreign to the objects of the partnership, must be inferred to have been acquired by consent of each partner, from the entries upon the firm books, unless it appears that one of the partners dissented at the time, or as soon as informed, in which case the dissenting party has a right to compel the party acting, to hold such acquisition, as his individual property, and to charge him with the amount of purchase money. *Ibid*, 519

9 If, upon the dissolution of a partnership, one partner is appointed to receive the debts due, and discharge the demands against the firm, he is trustee for the other partner or partners, and must be charged with the debts received at the nominal amount as shewn unless he shew that he received a less value, or made a composition because of the insolvency of the debtor, and the impossibility of collecting more, unless the debts or demands were payable in a depreciated medium.
If he pay off demands against the firm, in a depreciated currency which he has received at its nominal value, at the same value, he must be credited by the nominal amount of the demand discharged *Ibid*, 520–1

10 Where it appears that the books of a firm have been unskillfully or irregularly kept, commissioners appointed to adjust and settle the business of the firm, not confined to the books of the firm. *Ibid*, 522

11 Partner settling the affairs of a firm to be charged with the sums received and interest, and not to

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be credited by interest on debts paid, after he had or hands the funds of the firm. *Ibid*, 522

12 Upon dissolution of partnership, most regular to appoint a disinterested person, agent, to close the concern, but if partner appointed and he act faithfully, he is entitled to compensation, to be paid out of the funds of the firm. He is chargeable with debts lost by his negligence, but is not chargeable for delay; if debts be still collectable, each agent is the ministerial officer of the court, and bound to act as ordered, and may be compelled to proceed to collect and close the business or be superseded. *Ibid*, 524

Patent.

Vide Estoppel.

Payment.

1 See Mortgage. *Breckenridge's heirs vs Ormsby*, 258-9

2 Payment made in depreciated paper, but credited in "dollars," precludes future claims for depreciation. *White's ex'rs vs Guthrie &c* 503

3 Payment made in part, is under the direction of the payer, at the time; but if he owes several debts, and fails to apply the money specifically, the payee may apply it as he pleases. *Hilyer vs Vaughan*, 583

Petition and Summons.

1 Petition and summons may be maintained upon several notes, between the same parties. *Bliss vs Branham*, 201

2 Petition and summons will lie on replevy bond. *Sanders and Williams vs Outlen*, 483

3 Petition and summons furnish the appropriate remedy on notes &c. for the direct payment of money. *Fleming vs Campbell*, 499

Pleas and Pleading.

1 Plea that the plaintiff had conveyed the land warranted by them and lost prior to the institution of suit, must shew that such conveyance is by valid deed; which being the best proof of its own existence must be produced in court. *King vs M'Lean*, 33

2 When in pleading, the copy of a writing is proffered to the court and not exhibited, words employed will be understood in their popular and not strictly technical sense. *Ibid*, 37

3 Plea may be amended after the case has been remanded. *Ibid*, 38

4 The object of pleading to bring the controversy to a close and reduce the contest to a point. Two replications to a plea or two rejoinders to a replication not admissible. *Hazzard vs Smith*, 67

5 In action of covenant, it is sufficient to *plead generally*, that the covenant was procured by *fraud* of covenantee. *Sharp vs White*, 107

6 Plea of conditions performed, admits all facts well alleged, and assumes the proof of performance. *Harrison vs Park*, 172

7 If plea contain sufficient answer to plaintiff's declaration, want of form does not vitiate. *Hobbs and Churchill vs Middleton*, 180

8 Plea to an action of deceit, in the sale of a horse, the plaintiff had filed a bill in Chancery, to injoin the payment of the price of the horse, upon the allegation of fraud in such sale, and that the bill was dismissed, no bar, unless it appear, the question of fraud was fully investigated, and tried, and the bill was for neither recision nor set-off. *Jarman vs Daniel*, 198-9

9 If plea appear in the record not so noticed as to require the con-

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sideration of the court below, Court of Appeals will not regard it. *Cates vs Wooldridge*, 269

10 Vide Injunction. *Ibid*, 269

11 Plea to be good, must be certain. *Lillard vs Lillard*, 276

12 Plea may avoid an excess of interest. *Ibid*, 276

13 Plea subject to demurrer, but rejected without one, affords no ground for reversal. *Depew and Wood vs Bank of Limestone*, 380

14 Plea which is required to be sworn to, before filed, should be objected to; demurrer waives the oath. *Ingraham vs Arnold*, 407

15 Dillatory pleas and pleas in abatement. *Ibid*, 407

16 Plea in the terms of a contract and affirming performance, is equivalent to plea of "conditions performed." *Harris vs Ogg*, 410

17 Plea cannot enlarge a covenant. *Ibid*, 411

18 Plea that a covenant sued on, was satisfied and cancelled, tho' the satisfaction may have been by parol, yet it is a good bar, as no action could be maintained upon a cancelled instrument. *Bain vs Evans*, 432

19 Plea of release, must shew that it was under seal, or otherwise effective, or plea insufficient. *Gibson et als vs Weir and Anderson*, 446

20 Suit against two, one pleads, and issue; irregular to render judgment against plaintiffs, without trial of the issue, and notice of the defendant, not pleading. *Ibid*, 446

21 Plea, covenants performed, no evidence admissible, except to shew performance, any excuse for non-performance, must be specially pleaded. *Hoofman vs Sharp*, 489

22 Plea, failure of consideration, must shew the whole consideration had failed. *Johnson vs Williams*, 489

23 If replication put in issue, a single fact of several presented by plea, and it be found for defendant, it is correct to enter judgment, that plaintiff take nothing for breach of covenant, to which the plea was an answer. *Davis vs Ballard*, 581-2

Possession.

1 Possession of five years, of property, distributed under a marriage contract, which gave no right, will protect it against the creditors of the second husband, in the hands of children of the first. *Beard, &c. vs Griggs*, 28

2 If possession accepted, by tenant, from corporation, and its ownership recognized, it matters not whether the individual who delivers possession, be agent, it is the possession of the corporation, *Swartzwelder vs U. S. Bank*, 39

Power.

1 Power to sell, not restricted by specifying different modes. *Vanada's heirs vs Hopkins's adm'r.* 289

2 Power to sell, silent as to execution of bond or deed, or other writing, nugatory, unless, *ex ri termini*, the agent has power to bind his principal by writing, to make purchaser a sufficient deed, upon the payment of the purchase money. *Ibid*, 292

3 Execution of power, by attorney signing himself, "S. H. for himself, and as attorney for W. A." binds attorney personally; and though not informed, yet it will warrant chancellor, in decreeing a specific performance of the executory contract, which it evidences against the heirs of W. A. *Ibid*, 295

4 Powers of attorney, of all kinds, included in the act of 1818. II.

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Dig. 1049. *Caperton, adm'r. of Carr vs Callison*, 396

Practice.

1 Vide administrators and executors, under act of 1797, and act of 1811. *Hobbs and Churchill vs Middleton*, 131-2

2 Rule of Practice, always to take down the evidence at the term at which the cause is tried, when the court takes time till the next term, to consider a motion for new trial. *Talbot vs Miller*, 195

3 Two or more notes, for the payment of money, may be joined in the same summons. *Bliss vs Branham*, 201

4 Defective proceedings, in one circuit court, cannot be incidentally and collaterally examined by another. *Breckenridge's heirs vs Ormsby*, 256

5 Rule for publication, for eight weeks, not sufficient; two months are required. *Nall's heirs, &c. vs Combs*, 324

6 An order, granting a new trial, the def'ts praying the costs of first trial, 20 days prior to the next term, a nullity; pl'tff has a right to his execution. *Gaines vs Dailey*, 478

7 Rule of practice should promote, not defeat justice. Pl'tff not to be non-suited for an oversight, court should suffer a question to be asked and answered, even after non-suit ordered, and exception, if tending to sustain pl'tff's action. *Fightmaster vs Beasley*, 606

Presumption.

1 Presumption not indulged in favor of a party, whose duty it was, and who had the power to make fact appear. *Hazzard vs Smith*, 68

2 Presumption, when no evidence certified, in favor of jurisdiction of the court. *Talbot vs Miller*, 195

Printer.

Certificate of printer, that order of publication has been inserted "nine weeks," insufficient. *Passmore's heirs vs Moore*, 592

Privies in Blood.

Privies in blood or in representation, can avoid the voidable acts of infants or lunatics. *Breckenridge's heirs vs Ormsby*, 250

Privies in Estate.

1 Privies in estate, are by operation of law, not by contract. *Breckenridge's heirs vs Ormsby*, 250

2 Privies in estate, cannot avoid the voidable acts of lunatics or infants. *Ibid*, 250

Process.

1 Process must be executed in fact or in law, prior to a decree. *Dawson vs Clay's heirs.* 166

2 Process against three, but executed on two only, yet reads "process executed," held not conclusive. *Violet's heirs, &c. vs Waters* 303

Prochien Ámi

Cannot commute the debts due infant, but will be responsible for amount. *Forbes' heirs vs Mitchell*, 441

Promises.

Promises, independent of each other, may be sued on, without alleging performance. *Henderson vs Richards*, 496

Proof.

1 Proof being required of one of several def'ts to a bill, has the effect of a call from all. *Nall's heirs vs Combs*, 325

2 Proof is inadmissible, without an issue, by the pleadings. *Leach vs Gentry*, 350

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Property.

Property, mortgaged by one partner, cannot be diverted by another. *Mosely vs Garrett*, 217

Publication.

Publication, against non-resident, for *eight weeks*, not sufficient; it should be for *two months*. *Nall's heirs vs Combs*, 324

Purchaser.

1 Purchaser, to vacate a contract, on the score of fraud, should first have offered a recision, and tendered the thing sold. *Bain vs Wilson*, 203

2 Purchaser, of the equitable title to land, from A, in suit against B, who has acquired the legal title, with notice of the prior equity, need not prove that he has paid the purchase money to A. *Johnson vs M'Gilvary*, 321

Quære.

1 *Quære.* Whether fines and forfeitures, to be recovered in action *qui tam*, are to be appropriated to seminaries? *Yocum vs Daniel*, 14

2 Does a traverse dispense with the necessity of a judgment, upon the verdict before the justice of the peace? *Swartswelder vs U. S. Bank*, 46

Qui Tam.

1 *Qui tam*, the only action, for the penalty incurred by sending a challenge to fight in single combat. *Yocum vs Daniel*, 14

2 The action cannot be maintained in the name of an individual, and the trustrees of a seminary; the common'th must be a party. *Ibid*, 14

3 Vide *Quære* 1. *Ibid*, 14

Recision.

1 Person asking recision, must shew the adverse claim he fears, is superior, and covers his purchase. *Wilson vs Lafour*, 7-8

2 A contract for land, will not be rescinded by chancery, when the aggrieved party has remedy at law, or for any defect of title, known to the compl'nt, when he took the deed; nor unless all the parties in interest, are before the court. *Cummins vs Boyle*, 480

Recognizance.

See Mayor of Louisville. *Commonwealth vs Edwards*, 352

Record.

When immaterial, although between the same parties, if offered, record may be rejected. *Bate vs Lewis's ex'rs.* 315

Re-hearing.

Re-hearing, granted on account of admitting evidence, contrary to a variant from the allegations. *Clark vs Castleman*, 75

Relief in Chancery.

If a def't permit judgment to be entered against him for the nominal amount of a note, which, upon its face, is dischargeable in paper, chancellor will not grant relief, upon allegation that the judgment was for too much, his defence at law was complete. *Bain vs Harrison*, 595

Religion.

Associations, for the promotion of religion, will be aided in chancery. *Overstreet vs Bate*, 369

Remedy.

Remedy in courts, is invariably controlled by the *lex fori*, not the *lex loci*. *Ingraham vs Arnold*, 407

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Remittitur.

Remittitur is not required, to enable pl'tff to take a judgment, *de melioribus damnis*. *Cox, &c. vs Cook*, 361

Removal.

One, applying to remove a suit from the state court, to that of the United States, must show that he is a citizen of another state, and that his application is made at the term of entering his own appearance. *Eastin vs Rucker*, 232

Rents.

1 Rents, recovered from devisees, for the occupancy of testator, are to be compensated by the same mode of contribution, designated in the will as to lost land. It was a debt due by testator, and a charge upon his whole estate, *M'Lanahan's devisees vs Kennedy, &c* 337

2 Rents off-set, by interest accruing on value of land. *Ibid*, 339

3 Rents, of land mortgaged, to be accounted for as far as received, although, by covenant, the rent was to cover the interest of the loan; while the principal, advanced in Commonwealth's Bank bills, was sealed and made payable in specie. *Head vs Overton*, 557

Reorganizing Act.

1 Order, purporting to be *supersedeas*, granted under re-organizing act, void. Messrs. Barry, &c. were neither judges *de jure* nor *de facto*. *Tribble vs Frame*, 206

2 Vide *Hildreth's h'rs vs M'Intyre's devisees*, 207-8

Repleader.

Repleader awarded after reversal of cause. *Jarman vs Daniel* 199-200

Replevin.

1 In action of replevin, in the *detinet*, bond only necessary when there is restitution of property. Statutes of Virginia and Kentucky, do not apply, *Baker vs Harper*, 104

2 In action of replevin, in the *detinet*, if there be not restitution of the property, the bond given by plaintiff is inoperative; the insufficiency of the security, therefore, no cause for dismissing the suit. *Ibid*, 105

Replevy Bond.

A replevin-bond, executed by a part only of the def'ts, in an execution, may be quashed on motion of pl'tff, but not on motion of obligors in the bond. *Fulkerson vs Caldwell*, 496

Report.

Report of commissioners, when erroneous, will be set aside, the death of a witness, who had been examined, notwithstanding. *Honore vs Colmesnil*, 511

Restitution.

1 See Error.

2 Restitution will not be ordered, after *habere facias possessionem* regularly executed, notwithstanding *supersedeas* of the original judgment. *Hord vs Bodley*, 79

3 Restitution ought not to be granted where there has been no error in the proceedings, by which possession was obtained. *Ibid*, 80

4 Restitution may be by *scire facias*, but more commonly effected by motion. *Smith's heirs vs Mitchell's heirs*, 270

5 Restitution is not right, after reversing the judgment, but rests with the court. *Ibid*, 272

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Reversal.

1 Reversal can take place, on account of error, apparent on the record only. *Talbot vs Miller*, 195

2 Reversal of a judgment, should replace the parties as they were before judgment. *Thompson vs Clay's heirs*, 416

3 Suit against two, issue as to one only, and judgment against both will be reversed. *Gibson et al. vs Weir and Anderson*, 446

Revivor.

1 Judgment of revivor obligatory upon the courts, though erroneous, until reversed. *Smith's h'rs vs Mitchell's heirs*, 271

2 Revivor, by an order, not sufficient, unless the decedant had answered; there must be bill of revivor and notice. *Nall's heirs vs Combs*, 325

Rights.

1 Rights, claimed under a statute, in derogation of common law, must be placed strictly within the act. *Bain vs Wilson*, 204

2 Rights may be lost by negligence or acquiescence. *Mosely vs Garrett*, 216

Roads.

To question an order of county court, discontinuing a road, the party must shew an existing and exclusive interest, in himself, affected by it. *Cole vs O'Hara & Shannon*, 218

Rules.

Rules for settling partnership transactions, laid down and illustrated. *Honore vs Colmesnil*, 513–524

Sale.

1 Sale of land under a power, on conditions, not authorized, is divisible and the part authorized may be enforced. *Vanada's h'rs vs Hopkins' administrator*, 294

2 Sale designating a certain tract, yet giving metes & bounds, which extended into an adjoining tract, will be confined to the special calls. *Wallace vs Maxwell*, 447

Scire Facias.

1 *Scire facias* reciting the judgment intended to be revived so as to identify it, is good, & need not recite the clause for costs. *Ward vs Prather's adm'r.* 4–5

2 *Scire facias* admissible though unusual mode to obtain restitution. *Smith's heirs vs Mitchell's heirs*, 270

3 When *scire facias* adopted, must correspond with the record. *Ibid*, 271

Secretary of State.

1 Secretary of State being authorized by law to sell and exchange books with the assent of the governor, his acts bind the state without his consent. *Commonwealth vs Wood*, 311–12

2 Not necessary for person dealing with Secretary of State, to inquire whether the governor assented, nor in action to aver his assent. *Ibid*, 312

Securities.

1 Securities may plead without their principals. *Hobbs & Churchill vs Middleton*, 188

2 Securities should be parties to any act seeking a reversion or modification of the terms of the note. *Love vs Cofer &c* 328

Sergeant of the Court of Appeals.

Sergeant of the Court of Appeals not authorized to collect costs by execution. *Hardin vs the Governor for Handley's ex'rs.* 130

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Set-Off.

1 Set-off in equity, allowed only when there is a connexion between the demands, or complainant has not adequate remedy at law. *Noland vs Johnson &c.* 10

2 When reciprocal action for breach of covenant, there cannot be set-off. *Harris vs Ogg,* 412

3 T purchased land from C, with the will annexed of Y; the heirs of Y being impleaded, they surrendered this land as estate descended, to satisfy a demand against their ancestor; the land was sold under an execution. T purchased, and the execution vs the estate of Y, was credited by the purchase money—C attempts to coerce the original price stipulated to be paid by T, without giving him credit for the money paid upon the execution against the estate of Y deceased; T has a right to a set-off, of the sum credited, and interest. *Thompson vs Clay &c.* 414

4 Notice of set-off to a demand by warrant, which would not give an appeal to Circuit Court, judgment for defendant for more than five pounds, plaintiff may appeal to Circuit Court; upon appeal from justice of the peace, appellant must prove his account, though judgment for appellee upon set-off. *Morgan vs Boone,* 585

5 Notice of set-off does not admit plaintiff's demand, though special plea of set-off does, notice of set-off only admissible under general issue. *Ibid,* 586

Sheriff.

1 Sheriff is bound to responsibility, by his endorsement on an execution that he "made sale money not paid." *Payne vs Cowan,* 12

2 Sheriff is liable to an action for the escape of a party, surrendered in court by special bail, and ordered into custody—*Ita lex scripta est. Gordon vs Ryan,* 56

3 Sheriff acts at his peril, and is liable on his return of "no property." when the defendant has property, though mortgaged, and the equity of redemption sold; if the transactions have been fraudulent *Bucklin vs Johnson,* 228

4 Without a levy, and the verdict of a jury against the defendant's right of property, sheriff cannot demand of the plaintiff indemnity for proceeding on a fi. fa. *Ibid,* 228

5 Duty of sheriff to make sufficient levy before the return day of fi. fa., if the defendant have property in the county, subject to execution, and within the knowledge of the sheriff *Bell vs Commonwealth, use of Clarke,* 551

6 To render sheriff liable for failure to levy, it must appear that he had knowledge of property, subject to the execution, or of facts which would have enabled him to ascertain such property. *Ibid,* 551

7 Difference between the evidence of knowledge, as to personal property and land. *Ibid,* 552

8 Sheriff liable unless he make reasonable search after the property of defendant. *Ibid,* 554

9 The averments requisite in declaration, to charge sheriff on his official bond, for failing to levy execution. *Ibid,* 555

10 Since the statute of 1821, I. Dig. 504, sheriff bound to levy upon interest of mortgagor and responsible for failure. *Ibid,* 556

11 Incomplete replevy bond, in hand writing of deputy sheriff admitted as evidence in action vs principal, to prove that execution was in the hands of deputy, and when. *Ibid,* 555

12 To charge a sheriff for a failure to return an execution, it is

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necessary to prove that the person to whom it was delivered was his deputy. *Ibid*, 560

13 The 4th section of the act of 1811, II. Dig. 1144, excuses sheriffs for failing to return execution for good cause. *Thompson vs Ross*, 600

14 When sheriff has acted in good faith, has complied with the requisites of the law in all other respects, and has actually received an execution, emanating from another county, in a letter for the purpose of having it returned in time, has put it in the post office, directed it to the proper place, but has addressed it to Johnston Ross, instead of Joseph Ross, by accidental mistake, adjudged that he is not subject to the penalty of the law. *Ibid*, 600

Slaves.

1 Slaves are not subject to escheat, but to go to executors, &c. *Conclude vs Williamson, ad'mr of Conclude*, 17

2 Slaves are subject to creditors *Ibid*, 17

3 Slaves once free, remain free, unless disfranchised, as by creditors. *Ibid*, 17

4 Slaves are considered as chattels. *Ibid*, 18

5 Slaves must be delivered in fact, in order to vest a right in distributee by commissioners of county court, however perfect in form, may be their official report. *Beard vs Griggs*, 27

6 Slaves may be sold by a trustee, by and with the consent of *cestui que trust*. *Hancock vs Ship*, 438

Specific Performance.

Chancellor will not interfere to disturb long enjoyed security of possession, unless the right of complainants to a specific execution be made out in every particular. *Nall's heirs vs Combs*, 326

Statute.

1 Statute of 1819, against usury, does not apply to contracts made before its passage. *Lillard vs Field*, 276

2 Statute of 1798, declared all usurious contracts void. Since 1819, note in consideration of an usurious loan executed prior to that act, may be enforced for principal and legal interest, due on usurious loan. *Ibid*, 276

3 Statute impairing the obligation of contracts, whether prior or subsequent, are unconstitutional and so far void. *Head, Hobbs, et al. vs Ward et al.* 283

4 Statute of 1820, called the occupant law, declared constitutional. *Conn's heirs vs Manifee*, 478

Statute of Frauds.

Statute of frauds, not applicable to the consideration for land sold. *Gully vs Grubbs*, 386

Statute of Limitation.

1 Statute of limitation not applicable to trusts. *Pugh's heirs vs Bell's heirs*, 401

2 Statute of limitation not applicable to rights accruing to infants. *Ibid*, 403

Stockholders.

Stockholders not necessary defendants, in a suit against Bank commissioners. *Dana vs Brown*, 304

Submission.

Submission may be made by obligor, and the holder of the bond, they being the real parties, altho' there are assignees, &c. *Keith vs Gore*, 8

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Subpœna.

1 Service of subpœna, acknowledged by attorney in fact, not sufficient. *Hoofman vs Marshall*, 65

2 Subpœna, deficient as to parties, is no cause for a final dismissal of the bill. *Ibid*, 65

Sundays.

Sundays are excluded from judicial computations of time. *Brown vs McKee's representatives.* 473

Surveyor.

The acts legally done on the ground, by the surveyor, constitute the survey; he may make out the certificate thereafter, any mistake or fraud in doing it, may be corrected. *Wallace vs Maxwell*, 451

Tender.

Tender of deed after suit, cannot affect the action at law. *Couchmans vs Boyd*, 396

Time.

Judicial days alone, computed in determining, whether return of writ, be prior to its test. *Brown vs McKee's representatives.* 463

Trespass.

1 Trespass will not lie against A, who claimed and took, as his own, a boat made on his land and with his timber by B. *Burris &c. vs Johnson*, 196

2 Several verdicts being found in this speceis of action, plaintiff may take judgment on which he will. *Cox &c vs Cooke*, 361

Unknown heirs.

Statute of 1815, I. Dig. 61, regulating proceedings against unknown heirs, in Chancery, requires affidavit. *Dawson &c. vs Clay's heirs*, 166

Use and Occupation.

Assumpsit for use and occupation, the proper action where no legal special contract. Statute of frauds does not render a parol lease for more than one year, void, but precludes recovery upon such [illegible] and parol lease cannot be enforced, yet when executed by the actual occupation of the premises, the law will enforce payment for the use and occupation, but not more than was agreed upon, nor sooner. *Calvert vs Simpson*, 547-8

Usury.

1 Usury ought to be specifically alleged,—allegation that complainant let defendant have a slave worth $10 per month, for the interest of $100, and the slave thus served defendant for six months, not sufficient to bring the case within the statutes, against usury. *Noland vs Johnson*, 10-11

2 Defendant by proper plea, may exonerate himself from usury, since the act of 1819. *Lillard vs Field*, 276

3 Unless usury contaminate the note, by making part of the sum, the note could be enforced before the act of 1819. *Ibid*, 276

4 Usury without the act of 1819, may be purged by agreement. *Ibid*, 276

5 If lender risks his principal, upon a contingency, as the appreciation or depreciation of depreciated paper, and there is no trick or device, a contract for more than 5 per cent. and the principal, in the depreciated paper, no usury. *Wilson &c. vs Kilbourne*, 494

6 The purchase of an assignable note, at a discount, not usury; there must be a lending, and a

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reservation of interest, greater than six per cent. per annum; an express contract to pay interest, on a contract for bank notes, binds to pay interest. *Shackleford vs Morris*, 497

A lends B $300, in Common'the paper, payable in three years, in a medium equal in value to that loaned; B mortgages to A, land to secure the re payment, the use of which [illegible] the interest. Upon bill by B, to redeem, and charge of usury, decreed, that B must pay A, the value of the $300, at the date of the loan, in specie, after deducting the excess of the rent of the mortgaged premises, over the legal interest. Ruled, that the rent actually received by A, for the mortgaged premises, constituted the measure of his accountability. *Head vs Overton*, 557

Variance.

Declaration set out an obligation, payable 1st January, 1826, deft. plead *non est factum*, pl'ff offered in evidence an obligation, executed by deft, payable 1st January, 1827; objected to for variance, and objection sustained. *Rudd vs Thoms*, 299

Vendor and Vendee.

1 In parol contracts, for land, the right of vendee, to action for the consideration, depends upon the willingness and ability of the vendor to convey. *Dougherty's adm'r vs Goggin*. 374

2 If vendor hold two tracts of land adjoining, & sell a certain quantity, by metes and bounds, tho' it call for one tract; yet, if the metes and bounds run into the other, purchaser shall hold according to the metes and bounds. *Wallace vs Maxwell*, 447-8

Verdict.

By 43d Sec. of the act regulating civil proceedings, I. Dig. 255, general verdict upon several counts, good, tho' some of the counts defective. *Condren vs Gardner*. 589

Void or Voidable.

1 Deed, of a lunatic, is not void, but voidable, and cannot be avoided by same party. *Brecken- [illegible] vs Overton*, 239

2 Rule, as to what contracts are void, and what voidable. *Ibid*, 240

3 Deed not void, when the right passes by the delivery. 241-2-3

4 That which may be affirmed by assent, when disability removed, or which cannot be avoided by the adult or sane party, not void. *Ibid*, 246-7

Witness, Competent.

Covenant, plea *non est factum*, two subscribing witnesses, the signature of one illegible, and himself not known, the other witness had removed, and, tho' sought, not to be found, ruled that it was competent to introduce *the person* who had signed the names of the deft's, to prove that he had done so at their request. *Kemper et als. vs Prior et als*, 598

Without Exception.

1 Without exception, whenever the chancellor decrees a conveyance of the legal title, to an equitable claimant, it goes invariably upon the principle *of notice of such equity, in the def't before he took his title*. *Nall's heirs vs Combs*, 325

2 Without exception, an equity unrestrained, but by exceptions to its own validity, not asserted for twenty years, is stale. *Ibid*, 325

Words.

1 See "parties, 1. *Keith vs Gore*, 5

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2 See pleading 1. *King vs M'Lean*, 37

3 "Concerns and accounts," are mercantile and technical words, and should be understood in relation to the business of the parties employing them. *Bruce vs Burdett*, 82

Written Contracts.

Written contract not to be construed by oral evidence, except so far as relates to its execution. *Love vs Cofer et al.* 327

Writing.

The name of a subscribing witness to a contract, renders the writer a competent witness, to prove that he did it by request. *Hemper et al. vs Prior et als.* 598

Writ of Error, Limitation of.

1 Writ of error, certain to a common certainty, is good. *Brown vs M'Kee's representatives*, 472

2 The act of 1827, Session Acts, 1826-'30, does not repeal the act of 1816; 1. Dig. 390. The time for suing out writs of error, is not abridged. The period from 31st Nov. 1824, till 1st April, 1827, is not to be computed, but to be deducted. *Davis vs Ballard*, 565

3 The act of 1827, Session Acts 30, does not violate any provision of the constitution. The judgment of an inferior court, erroneously rendered, is, at all times, subject to revision and reversal, should the legislature repeal the statute limiting the time for prosecuting writs of error, such judgment cannot constitute a property in any individual, to which he can acquire right by lapse of time; it does not create a right, it merely determines conflicting claims, according to the pre-existing right. The revising court inquires what was right between the parties, in the original controversy. *Ibid*, 571-2

4 The limitation, upon the time of prosecuting a writ of error, is a restriction by law, of a general right to take jurisdiction. The repeal of that limitation, is a regulation by the legislature, restoring that right. The regulations of the time of suing out writs of error, and the sums for which to be prosecuted, are, by the constitution confided to the legislature. *Ibid*, 574

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